

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

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PACKGEN,

CIVIL ACTION

Plaintiff

Docket No: 2:12-cv-80-JAW

-versus-

**Volume II**

BERRY PLASTICS CORPORATION, et al.,

Defendants  
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Transcript of Proceedings

Pursuant to notice, the above-entitled matter came on for **Hearing on Motion** held before **THE HONORABLE JOHN A. WOODCOCK, JR.**, United States District Chief Judge, in the United States District Court, Edward T. Gignoux Courthouse, 156 Federal Street, Portland, Maine on the 3rd day of March, 2014 at 10:30 a.m. as follows:

Appearances:

For the Plaintiff: Kurt E. Olafsen, Esquire

For the Defendants: Phillip S. Bixby, Esquire  
Jonathan M. Dunitz, Esquire

Dennis R. Ford  
Official Court Reporter

(Prepared from manual stenography and  
computer aided transcription)

I N D E X

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Nancy Fannon	263	297	334	343
Mark Filler	345	363		

E X H I B I T S

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SIDE BAR CONFERENCESCHAMBERS CONFERENCES

1 (Open court. Parties present).

2 THE COURT: Good morning.

3 MR. OLAFSEN: Good morning, Your Honor.

4 MR. DUNITZ: Good morning, Your Honor.

5 THE COURT: Ready to proceed?

6 MR. DUNITZ: Yes, Your Honor. We call Nancy  
7 Fannon.

8 THE CLERK: Please raise your right hand. Do  
9 you solemnly swear that the testimony you will give in  
10 the cause now in hearing will be the truth, the whole  
11 truth, and nothing but the truth, so help you God?

12 THE WITNESS: I do.

13 THE CLERK: Thank you. Please be seated.  
14 Please state your name and spell your first and last  
15 name for the record.

16 THE WITNESS: Nancy Fannon, N-A-N-C-Y  
17 F-A-N-N-O-N.

18 THE COURT: You may proceed.

19 DIRECT EXAMINATION

20 BY MR. DUNITZ:

21 Q. Good morning, Ms. Fannon. Could you briefly  
22 describe your background to the Court.

23 A. Yes. I'm currently the partner in charge of  
24 litigation services for the accounting firm Meyers  
25 Harrison & Pia. In that regard, I'm in charge of all

1 the business valuation work that runs through our  
2 Portland, Maine, office, which is a national practice,  
3 as well as all of the litigation commercial damage work  
4 that runs through the entire firm. We're based in New  
5 Haven and Manhattan.

6 I have a degree in accounting. I also have  
7 several credentials related to business valuation.  
8 I've authored a number of textbooks on valuation, as  
9 well as a textbook on commercial damages of which I'm  
10 an editor. I've also technically reviewed and  
11 participated in numerous other business valuation  
12 textbooks and I teach valuation and damages frequently  
13 all around the country to judges, lawyers, my peers,  
14 IRS agents, anyone that would ever have use of these  
15 services.

16 Q. How many times have you been retained as a lost  
17 profit damages expert?

18 A. Probably at least 500.

19 Q. Do you recall how many times you've testified as  
20 a damages expert?

21 A. I've testified about a hundred times. Some of  
22 those case are business valuation, some are damages.

23 Q. And have you ever been excluded from testifying?

24 A. I have not.

25 Q. Did you endorse Mr. Filler's statistics book?

1 A. No, I didn't at all. In fact, the first time I  
2 realized that I was even mentioned in the book was last  
3 Wednesday to my surprise.

4 Q. Were you asked permission to use your name in the  
5 book?

6 A. I was not, and perhaps I should provide a little  
7 bit of context for how he thinks my name got in there.  
8 A number of years ago -- I knew that Mr. Filler used  
9 statistics in some of his analyses so I asked him if he  
10 was interested in writing a chapter for my damages  
11 book.

12 When I reviewed it, I ultimately had some  
13 issues with it so I had it technically reviewed by a  
14 statistician and made the decision to reject the  
15 materials and it's my understanding that he went on and  
16 used those materials in the book that he subsequently  
17 published.

18 Q. Before we move on, I notice you took a couple of  
19 package of documents up. Just so Kurt knows what you  
20 have with you, can you identify what you brought with  
21 you.

22 A. Yes. I have my report and I have Mr. Filler's  
23 report, as well as the additional documents that we  
24 received about a week ago, the revised exhibits.

25 MR. DUNITZ: Do you have any objection to her

1 using that?

2 MR. OLAFSEN: No objection.

3 BY MR. DUNITZ:

4 Q. Ms. Fannon, can you tell the Court what Berry  
5 Plastics engaged you to do in this case?

6 A. I was engaged to review the opinions that had  
7 been offered by Mr. Filler.

8 Q. And what did you find?

9 A. It was my ultimate opinion that the work that he  
10 did, based on the work that he did and the lack of  
11 information that he had, he could not have expressed an  
12 opinion to a degree of economic certainty.

13 Q. And how do you define reasonable certainty?

14 A. I define it as best available proof. When I  
15 think about reasonable certainty, I first think to our  
16 standards that we hold, that we have that guide us as  
17 experts and those standards require us to do our work  
18 relying on sufficiently reliable data and I also know  
19 that the court -- courts have interpreted reasonable  
20 certainty and, in general, studies of what the courts  
21 mean by that is to have the best available proof.

22 Q. Are you aware of any cases that identify it as  
23 being better than 50 percent?

24 A. No, I've not heard that before.

25 Q. You were here last Thursday for Mr. Filler's

1 testimony; is that correct?

2 A. Yes, I was.

3 Q. And did any of his testimony from Thursday affect  
4 your opinions in this case?

5 A. Yes, it did.

6 Q. Can you describe for the Court how those -- your  
7 opinions were impacted?

8 A. Last Thursday was the first time that I heard Mr.  
9 Filler express that -- his opinion that there had been  
10 a complete destruction of a segment of Packgen's  
11 business, so to me that's a very material statement and  
12 I think I can best explain why that is if I start by  
13 explaining when you do certain damage calculations,  
14 what the circumstances are that would lead you to do  
15 one damage calculation versus another, and then how --  
16 generally how those calculations are done and then  
17 compare that to what Mr. Filler has done.

18 Q. So if you could explain the difference between  
19 the two models for the Court.

20 A. Generally when a loss has occurred, one of the  
21 first things the expert has to assess is has there been  
22 a complete destruction of a business or a segment of a  
23 business or does the company have a temporary loss from  
24 which they are expected to recover.

25 In this case, Mr. Filler testified last week

1       that he believes there was a complete destruction in  
2       the business related to CRI. If that was the case,  
3       then the only proper measure of damages is to calculate  
4       a loss of business value, how much did the stock value  
5       go down because of this permanent loss from which they  
6       would never recover.

7               The way that loss of business value is  
8       typically calculated is by doing a business valuation  
9       using all of the information and methodologies that you  
10      would typically employ in a business valuation, and the  
11      most common of those would be to do a discounted cash  
12      flow calculation where you forecast out what the net  
13      cash flow, and by that I mean net after-tax cash flow  
14      of the business because that's what we use in the  
15      business valuation or of the segment of the business,  
16      and you apply a risk-adjusted rate to that. So that's  
17      a loss of business value.

18             In a lost profits calculation, it's  
19      appropriate to do that calculation when you believe  
20      that the company will recover, so this is a temporary  
21      loss that the business is claiming they have suffered  
22      and, in fact, up until last Thursday, Mr. Filler was  
23      claiming he had done a lost profits calculation. So a  
24      lost profits calculation is for a temporary loss with  
25      recovery based on the incremental profits of the



1 business.

2 Now, if we step back and compare that to what  
3 Mr. Filler actually did, he made a calculation of what  
4 he called the net profits of the business for a  
5 ten-year period and in making that calculation, he  
6 testified that he deducted all direct costs, all  
7 variable costs and all fixed costs which are, in fact,  
8 all of the costs of the business and which would be  
9 appropriate to deduct for a loss of business value  
10 claim.

11 In a lost profits claim -- I'm sorry, a lost  
12 value claim, you would then go on and tax affect the  
13 earnings, take other cash flow items in consideration,  
14 like working capital needs, capital expenditure needs,  
15 and that gives us the net after-tax cash flow that you  
16 then apply a risk-adjusted rate to and, in fact, the  
17 risk-adjusted rate that Mr. Filler used was relevant  
18 for -- to be applied to net after-tax cash flow.

19 One of the things you would do in a valuation  
20 is you would look and see when you're forecasting, does  
21 the forecast that I've arrived at for net pre-tax  
22 profit make sense in light of the company's historical  
23 track record and for this segment of the business that  
24 he's saying was totally destroyed, he's determined that  
25 the profitability of the segment of the business was

1 37 percent of revenues.

2 Well, in a valuation, you would say how can I  
3 test that and make sure that makes sense and, in fact,  
4 if you look at the four years prior to the year of the  
5 alleged incident, their average profitability was only  
6 3.6 percent. So he's forecasting the segment would  
7 have had ten times greater profitability than the  
8 company has had historically.

9 In terms of the ten-year term, he went out --  
10 he indicated that that was a rule of thumb to go out  
11 ten years. There is no such rule of thumb as a  
12 ten-year rule of thumb and he further indicated that  
13 going out ten years captured 90 percent of the value.

14 Well, I'm not sure how only capturing  
15 90 percent of a value calculation gives you a complete  
16 picture of it as well. So we don't really have a  
17 calculation that reflects the value of that segment of  
18 the business such as would be appropriate for a loss of  
19 value calculation.

20 Now, prior to last Thursday, Mr. Filler had  
21 indicated he had done a lost profit calculation and as  
22 I testified a moment ago, when you do a lost profit  
23 calculation, the issue is the temporary loss, so you  
24 forecast out the difference between what you believe  
25 would have happened but for the alleged incident and

1        what you now believe will happen. Well, he ignored the  
2        second part of that calculation.

3                One of the things he also testified to last  
4        week was he didn't consider mitigation, he didn't ask  
5        about mitigation, he didn't know anything about  
6        mitigating sales and we know there were other sales.  
7        He never brings his lost profits back together again to  
8        the point at which the company would have recovered.  
9        So what we have is something that is neither a loss of  
10       business value calculation nor is it a lost profit  
11       calculation.

12       Q.       And when you calculated his weighted average cost  
13       of capital, he determined the value of the business and  
14       is that consistent with his opinions?

15       A.       No. In fact, he's got some internal  
16       inconsistency in his analysis. The exhibit that he  
17       calculated his revised weighted average cost of capital  
18       on purported to calculate the value of the company so  
19       that he could use the -- what he determined was the  
20       equity value of the company and the debt of the company  
21       in the weighting to determine the weighted average cost  
22       of capital.

23                When he made that calculation, he determined  
24       that the equity value of the company was 4 and a half  
25       million dollars. Well, he also determined that the

1     loss of the segment from the CRI business alone was, I  
2     think it was, \$4.6 million. You can't lose more than  
3     the value of the entire company to begin with.

4     Q.     Ms. Fannon, do you recall on Thursday Judge  
5     Woodcock asked why the experts were raising forecasts  
6     instead of actual results six years after the incident?

7     A.     Yes, I do.

8     Q.     Now, regardless of causation or blame, if the  
9     segment of a business remains entirely without sales  
10    six years after the loss, is the appropriate  
11    methodology loss of business or lost profits?

12    A.     It would be loss of business value if it's a  
13    permanent destruction of the business.

14    Q.     And here again, this is for CRI, do we have an  
15    opinion based on loss of segment of the business?

16    A.     Well, no. As I just indicated, we don't have  
17    either a loss of the value of the business calculation  
18    that was properly made or a lost profit calculation.

19    Q.     Do you recall last week when Mr. Filler testified  
20    that he used a sales projection method to determine the  
21    lost profits of CRI?

22    A.     I do.

23    Q.     What data is typically used by a lost profits  
24    expert to determine lost profits using the sales  
25    projection method?

1       A.       Well, let me first explain what a sales  
2       projection method is. Every lost profit calculation is  
3       really nothing more than making a sales projection of  
4       what you think the company would have done but for the  
5       alleged incident and comparing that to a sales  
6       projection of what either they did in the past or what  
7       you now expect them to do going forward, so every lost  
8       profit calculation is a sales projection method.

9               However, when we talk about methodology in  
10       lost profit damages, when we use the terms like -- we  
11       used sales projection method or we've used a before and  
12       after method or a market model method, what we're  
13       really talking about is the way that experts go about  
14       collecting evidence to support their forecasts that  
15       they're making.

16              In the actual method that he used, although  
17       this is really just a matter of terminology, the actual  
18       method that he used was a before and after method. I  
19       think he said I couldn't have done a before and after  
20       because there was no after. There's often no after  
21       that you can use in your calculation, so very often,  
22       you'll just rely on before and, in fact, that's what he  
23       did. He relied on a very limited slice of time, six  
24       months, to project the next ten years.

25       Q.       Is there a specific document that you would need

1 to do a sales projection method when you're gathering  
2 the evidence? What is it that you're looking for?

3 A. Usually when you use a sales projection method,  
4 what you're talking about is using a sales projection  
5 that was prepared pre-litigation, so it's a  
6 pre-litigation profit projection that was prepared by  
7 either the defendant or the plaintiff.

8 Q. And did you find any internal sales projections  
9 in your review of the financial documents here?

10 A. No. In fact, we specifically asked the company  
11 if they had made any forecasts and they indicated that  
12 they did not. If there is a sales projection, you want  
13 to go back and you want to test that against historical  
14 forecasts that the company had made and they indicated  
15 that -- so that we can see how accurate they are when  
16 they do their forecasting. They indicated they had no  
17 such forecasts to test.

18 I only know then of one forecast the company  
19 had historically made and that was when they forecasted  
20 that they were going to sell millions of dollars of  
21 boom to BP and, in fact, they didn't sell any, so that  
22 would give me some indication of the reliability of  
23 their ability to forecast.

24 Q. Ms. Fannon, on Thursday do you recall whether Mr.  
25 Filler testified that his calculation on inflation was

1 conservative?

2 A. I do, yes. He indicated that he had made a  
3 conservative -- by applying inflation to his bottom  
4 line profits in his damage calculation, he said he was  
5 being conservative because if he had instead applied  
6 inflation to sales, and then separately applied  
7 inflation to costs, costs would have grown at a slower  
8 rate than sales would have grown. Well, that's not  
9 actually how you do it from a methodology point of  
10 view.

11 I agree, he could have applied inflation to  
12 his revenue figures, but then costs would grow in  
13 proportion to those revenues. You don't grow costs by  
14 inflation, you grow it in proportion to revenue. So,  
15 in fact, the way he did it was the way you would do it  
16 or I should say the results you would get so to me,  
17 that doesn't indicate anything about it being  
18 conservative.

19 Q. Do you recall what Mr. Filler testified his  
20 purpose for going to Packgen -- his visit to Packgen  
21 was?

22 A. Yes. He indicated that he was going there to  
23 test the capacity constraints of the company.

24 Q. Based upon the evidence that you've heard and the  
25 testimony you've heard, was it possible for him to do

1       that?

2       A.       I don't believe that it was possible for him to  
3       use those visit to assess capacity of the company. He  
4       can't even tell us how many units he was forecasting  
5       they would have sold to the refineries, so if you don't  
6       even know how much the company is projected to sell,  
7       it's impossible to assess capacity.

8               In addition, we have three different opinions  
9       from him as to the time that he was up there testing  
10      how quickly they made the product, which is what he  
11      said he relied on for his capacity analysis. He said  
12      one thing in his deposition, he said another thing in  
13      his errata sheet and then he said a completely  
14      different thing last Thursday.

15             Unfortunately, we can't really tell which is  
16      correct because that's supposedly work that he did on  
17      the floor and there are no notes that we can go back  
18      and look and see what that actually was, so there's no  
19      way to actually test that with the information that he  
20      had.

21      Q.       And hypothetically, in order to meet its  
22      capacity, Packgen had to add shifts to its production  
23      schedule. Is there data that you would need to see in  
24      order to calculate whether it could increase its  
25      capacity?



1       A.       Well, I'd want to know at each stage along the  
2       way, as they reached certain levels of production, how  
3       much more capacity would they have to add and what  
4       would be the costs of adding that capacity.

5       Q.       And was that -- any of that evidence in the  
6       documents that you reviewed in this case?

7       A.       I didn't see any.

8       Q.       When you're conducting a lost profits analysis  
9       for a manufacturing facility, is there a method that  
10      you use to test the accuracy of the company's  
11      manufacturing process?

12      A.       Well, I mean the manufacturing costs are, of  
13      course, a matter of what the evidence says they are for  
14      a particular product line. As we know, Mr. Filler used  
15      an average of two different costs, but one of the  
16      things that you do is you go back and you look  
17      historically to say how do these manufacturing costs  
18      that I'm using compare with their actual historical  
19      manufacturing costs. Mr. Filler didn't do that  
20      analysis to look and see. In fact, if we look at  
21      Packgen's financial statements both before and after  
22      the alleged incident, their manufacturing costs ran in  
23      the range of 50 to 55 percent of revenues and in Mr.  
24      Filler's analysis -- and my initial report was his  
25      opinion was based on a price of \$225, he calculated

1       that manufacturing costs would be only 35 percent.  
2       Obviously -- of revenues and, obviously, that would  
3       increase the profit.

4               If you use the \$196 revenue that I didn't know  
5       about at the time I did my report, then it still comes  
6       out to only 40 percent of revenues. So that would be  
7       something that you would typically look at to see if  
8       the information that you have is grounded in historical  
9       results.

10      Q.       Do you have an opinion regarding Mr. Filler's  
11      calculation of Packgen's overhead using statistical  
12      theory?

13      A.       I don't. I specifically did not provide any  
14      opinions on Mr. Filler's statistical models in this  
15      case, but I just noted that he did use -- it wasn't  
16      just the simulation models that he ran for CRI and for  
17      the refineries, it was also the CRI deterministic model  
18      involved the use of statistics to determine overhead.

19      Q.       When you are determining lost profits in your  
20      practice, do you use statistics to calculate overhead?

21      A.       No, I don't.

22      Q.       Why not?

23      A.       Because I don't believe that accountants, as a  
24      matter of course, should typically be using statistics  
25      unless they hold themselves out as a statistician and

1 have that relevant training.

2 Q. Do you recall Mr. Filler's testimony on Thursday  
3 that the prior success rate of selling to 37 refineries  
4 was irrelevant because of a new marketing plan that  
5 they had?

6 A. Yes, I do. That was also something that was -- I  
7 had not heard before, but the reason he said that we  
8 couldn't rely on their historical sales to refineries  
9 was because they had this great new marketing effort in  
10 place and he described that marketing effort as being  
11 the refineries would see CRI pull up with Cougar bags  
12 and, in fact, that would be, I think he called it, a  
13 stamp of approval to the refineries that would make  
14 them want to buy the bag too.

15 Well, if that was true, then the reverse would  
16 also be true. In other words, if the refineries had  
17 reasons why they were rejecting using Packgen's bags,  
18 then the reverse would be true and they could say to  
19 CRI we don't want that bag on our facility, we don't  
20 want you to buy it and bring it here.

21 The other thing is we don't even know, and I  
22 don't believe -- I know Mr. Filler didn't have this in  
23 his report or has not testified about it, how many of  
24 those refineries were actually buying their catalyst  
25 from CRI, so we don't even know if that theory would

1 hold true if they didn't even see CRI pull up with the  
2 bags.

3 Q. And were there any -- did you see any evidence  
4 that would suggest there was a reason that the  
5 refineries would not want Cougars on their facility, at  
6 their facilities other than the Berry product?

7 A. Yes. I saw significant evidence why the  
8 refineries were not buying. Ms. Horton had a listing  
9 of the 37 refineries that she had been contacting and  
10 attempting to make sales to.

11 Of that list of 37 refineries, and all of the  
12 reasons that she documented why they weren't buying  
13 from CRI, only one refinery listed CRI as the only  
14 reason why they weren't buying. There were a few other  
15 refineries that had listed CRI plus other reasons why  
16 they weren't going to buy the Packgen product, but the  
17 vast majority of reasons why the refineries were  
18 telling Packgen they weren't going to buy their product  
19 was because of things like fires that had occurred  
20 using the Packgen product and these fires had nothing  
21 to do with the accused product. These fires had to do  
22 with the faulty material that the customer was putting  
23 into the bags, and she clarified that the material  
24 that -- the highly pyrophoric material that the  
25 customer was putting into the bags had nothing to do

1 with the Berry product.

2 Other reasons given were there were a couple  
3 of customers that expressed concerns about the bags  
4 puncturing. They complained about the fact that the  
5 bottom was not solid and that it slid through the slats  
6 of the pallets and then when a forklift came to pick it  
7 up, it would puncture the bags and that could cause a  
8 fire.

9 There was an incident of the bags melting when  
10 a customer -- as Ms. Horton testified, or testified at  
11 her deposition -- again put the wrong material into the  
12 bags.

13 The most common reason cited on Ms. Horton's  
14 list was because of rumors that were being spread by  
15 CHEP and in her deposition, she clarified that what she  
16 meant by those rumors was that CHEP, who is their very  
17 aggressive competitor and has the majority of the  
18 market share, was sending around or passing around  
19 rumors about what they alleged was the Packgen bag on  
20 fire and, in fact, she said it wasn't even the Packgen  
21 bag, it was someone else's bag in the picture.

22 She also complained about Packgen -- I'm  
23 sorry, CHEP having an incestuous relationship with all  
24 of their customers and that they had used very  
25 aggressive marketing techniques.

1 Well, Mr. Filler testified in his deposition,  
2 and I believe he testified again on Thursday, that if  
3 the reason why the customers weren't buying the Packgen  
4 bags for something other than the Berry product, he  
5 believes his damage calculation is correct, it just  
6 might be a different defendant. Well, maybe that  
7 different defendant was CHEP. They were the ones who  
8 were listed more than any other reason for why the  
9 customers weren't buying.

10 In addition, one of the customers was -- or  
11 one of the refineries that they had on their list was  
12 BP and they sued BP in 2011. In fact, I think they  
13 sold to BP in 2009 and 2011 and then BP stopped buying  
14 from them after they sued them.

15 Well, we can't tell in Mr. Filler's analysis,  
16 and he can't tell us which of the refineries he's  
17 saying would have bought, but if the reason they're not  
18 buying -- if his ten percent analysis came out and  
19 selected through his statistical model BP or Shell or  
20 Imperial or any of these other refineries, 36 out of  
21 the 37 of them basically which provide other reasons,  
22 then we know they were buying -- not buying for  
23 completely unrelated reasons to the CRI alleged  
24 incident.

25 Q. Do you recall Mr. Filler's testimony on Thursday

1       that Packgen's projection for sales to the 37  
2       refineries exceeded his ten percent?

3       A.       Yes.

4       Q.       And in your work as lost profits expert, have you  
5       been faced with the rosy prognostications of a client?

6       A.       Yes. In almost every case I do, the client  
7       presents rosy forecasts.

8       Q.       And what do you do to determine what the  
9       appropriate forecast is; do you just guess at ten  
10      percent?

11      A.       Well, no, absolutely not. In this case we had a  
12      couple of things that Mr. Filler could have looked at.  
13      He could have looked to their actual success rate at  
14      selling to the refineries, and they did have some  
15      success in 2007 selling to the refineries.

16               We also would have looked to the reasons why  
17      the refineries weren't buying and that would have  
18      informed us as to what a likely success rate was for  
19      the -- with a group of refineries that actually may  
20      have bought the product but for the alleged incident.

21      Q.       And from the methodological standpoint, are there  
22      circumstances under which a lost profits expert can  
23      assume that once a sale is made to a certain customer,  
24      sales will continue for an extended period of time?

25      A.       You would not make that assumption without doing

1 some form of testing.

2 Q. What kind of testing would you typically do?

3 A. Well, in this case what you would do is you would  
4 go back and you would get evidence of their actual  
5 historical customer retention rates, which is  
6 information that they would have had available, but was  
7 not produced.

8 Q. And Ms. Fannon, do you have an opinion regarding  
9 Mr. Filler's application of Pratt's Stats and how that  
10 impacted methodology?

11 A. Yes, I do. Mr. Filler used the Pratt's Stats  
12 transaction database in calculating his weighted  
13 average cost of capital and he did that by first  
14 calculating the value of the business, which he  
15 calculated to be \$4.4 million by use of a -- I believe  
16 it was around a .7 multiple that he obtained from  
17 Pratt's Stats and then he used that equity weighting in  
18 his weighted average cost of capital.

19 A couple things about the Pratt's Stats data  
20 that he used. The first thing is the companies that he  
21 selected were basically companies that were sewing  
22 things like awnings and other canvas products that I  
23 don't believe have a similar risk profile to what a  
24 company like Packgen would have for the product that  
25 they were making in the markets that they were serving,



1 but also, his application of Pratt's Stats was  
2 incorrect.

3 He testified last Thursday that Pratt's Stats  
4 provides a multiple that gives you the indicated value  
5 for intangible assets and fixed assets of a company.  
6 That may be true for a random number of transactions  
7 that comes up, but Pratt's Stats is a database that  
8 basically tells the analyst the transaction as the  
9 transaction actually occurred.

10 So some companies buy working capital and  
11 fixed assets and intangible value. Some companies buy  
12 accounts receivable, inventory, fixed assets so you  
13 actually have to go in and look at the data and figure  
14 out what was actually bought in each of these  
15 transactions before you can just take a multiple that  
16 goes across the entire database.

17 Q. Before we move on, can you just explain what you  
18 mean by risk profile between the sewing companies and  
19 what would have been the appropriate method for finding  
20 the correct SIC code.

21 A. Well, I would have looked for SIC codes that  
22 dealt with customers that had a similar risk profile to  
23 the customers that Packgen served because that's --  
24 when we choose a market multiple, what we're really  
25 trying to say is -- a market multiple is just the

1       inverse of a discount rate or a capitalization rate  
2       which measures the risk related to a particular  
3       business, so what we're trying to do is we're trying to  
4       assess the risk profile of a particular company.

5       Q.       And can you explain to the Court how Mr. Filler's  
6       use of Pratt's Stats impacts the reliability of the  
7       model?

8       A.       Well, we don't really -- we don't really know if  
9       the .72 multiple is accurate or not because he didn't  
10      provide -- he didn't have the information about what  
11      assets and liabilities were actually acquired in each  
12      of the transactions.

13      Q.       Just for the moment I want to go back to the  
14      overall methodology that he uses because I want to make  
15      sure that it's clear here.

16               Do we have an actual method, a cogent method  
17      for determining profits in Mr. Filler's opinion?

18      A.       We don't have a reliable method for determining  
19      profits in his methodology in either -- in neither the  
20      -- well, if you call it a loss of business value  
21      calculation, which would be appropriate for the total  
22      destruction of the business because we know he hasn't  
23      captured all of the expenses and we also don't for the  
24      lost -- if he calls it a lost profit calculation.

25      Q.       And why is it inaccurate if it's a lost profits

1 calculation?

2 A. Well, it really goes back to the same thing about  
3 fixed versus variable costs. First of all, the cost of  
4 goods sold that he used, I believe, does not accurately  
5 reflect the full cost of goods to the company and we  
6 know that because that doesn't compare with their  
7 historical results.

8 In the overhead that he used, he testified  
9 that he applied both a variable and fixed costs. Well,  
10 that's all of the costs of the company and if he really  
11 did -- and I agree for the volume that he was  
12 forecasting, there's a point at which even fixed costs  
13 become variable because you're increasing the business  
14 so much, which is what he was forecasting. He clearly  
15 hasn't captured all of the costs of the company, again  
16 because he's forecasting 37 percent profit compared to  
17 their 3.6 percent historical.

18 Q. And where you're doing a lost profits  
19 calculation, is it possible to do one -- sorry, let me  
20 strike that.

21 How does the complete lack of mitigating sales  
22 impact his lost profits calculations, assuming that's  
23 what he did?

24 A. Well, it renders it not really a lost profit  
25 calculation because in a lost profit calculation, you

1 demonstrate when the company is going to recover and  
2 usually that's through mitigating sales, either to the  
3 customer that you're alleging was lost or to other  
4 customers where you eventually get to the point where  
5 you would have gotten anyway. So he left out that  
6 second part of his calculation.

7 Q. And so without mitigating sales, what's the  
8 appropriate measure of the loss here?

9 A. Well, if the business is never going to recover,  
10 the appropriate measure of the loss is loss of business  
11 value.

12 Q. And other than Mr. Filler's testimony last week  
13 that he was basing his ten-year period on destruction  
14 of a segment of the business, have you seen any  
15 reliable data that would establish a ten-year period  
16 for the loss?

17 A. No, I have not.

18 Q. I just want to look at your report now a little  
19 bit. I believe that covers last Thursday.

20 Is it reliable to project ten years of sales  
21 based on six months of sales?

22 A. I don't believe that it is. Again, this is one  
23 of the things that you could do some backtesting on and  
24 you could see -- if I just take this six-month surge,  
25 does it make sense if I use this surge to predict the

1 -- or this limited period of a surge to predict the  
2 next ten years.

3 So what I mean by backtesting here is you  
4 could go back and look at how much sales the company  
5 had made to CRI historically and seen if once they had  
6 a surge, did they always continue to have that surge.

7 So one of the things I talked about in my  
8 report is we know what units were sold to CRI  
9 historically and, in fact, they did have a surge and,  
10 in fact, if I can just reference my reports so I get  
11 the right numbers.

12 If we look -- it's on Page 16 of my report --  
13 in 2003, they sold 3,920 units; in 2004, 6,688; in  
14 2005, 10,040; in 2006, 5,706. So that would tell me if  
15 we were back in 2005 and trying to forecast what the  
16 company was going to sell to CRI in the next year, if  
17 we just assumed that that level was going to increase  
18 into infinity or ten years, we'd be wrong because the  
19 next year they only sold about half of what they had  
20 sold in the prior year, so that would tell me there is  
21 volatility in their sales over time.

22 Q. Is there a way to deal with the volatility in  
23 sales?

24 A. Well, often what you'll do is you'll go back and  
25 you'll take some longer term historical average of

1 sales.

2 Q. Do you have an opinion about the reliability of a  
3 lost profits model where an expert is directed to  
4 assume causation?

5 A. Yes, I definitely do. I don't believe -- when  
6 we make a forecast, which you do -- you make a  
7 forecast both when you're doing a lost profit  
8 calculation and you also make a forecast when you're  
9 doing a loss of business value calculation and when you  
10 make a forecast, it's our job to consider all of the  
11 things that would have affected that forecast because  
12 you can't -- not just the alleged incident and assume  
13 nothing else is going to affect the company, you have  
14 to take into consideration all the other things that  
15 were going on at the time, otherwise you'd have a  
16 forecast that's completely irrelevant and not tied to  
17 the facts.

18 Q. And when you're talking about causation here,  
19 you're not talking about the same thing we talked about  
20 in liability, about whether the accused product  
21 actually caused the bags to be defective; is that  
22 correct?

23 A. That's right. I'm talking about what are all of  
24 the other things that would have caused the forecast to  
25 be one thing or another.

1 Q. And was there evidence in this case that would  
2 have impacted the forecast?

3 A. Yes. There are numerous things that I believe  
4 should have affected any forecast that was made that  
5 Mr. Filler either wasn't aware of or just didn't take  
6 into consideration at all.

7 For example, we know that Packgen had a tense  
8 relationship with CRI and, in fact, they had a tense  
9 relationship with them for quite an extended period of  
10 time. Going back to 2005, there's e-mail  
11 correspondence documenting Packgen's concern that they  
12 were going to lose CRI as a customer at that time. We  
13 know in the fall of 2007, there was a number of tense  
14 e-mails about missed deadlines and how no further  
15 deadlines could be missed. They had missed getting a  
16 shipment on time to CRI and CRI was very unhappy about  
17 that.

18 Mr. Lapoint had testified in his deposition  
19 that CRI had a very short fuse with all IBC  
20 manufactures so we know that there was already a  
21 tendency for them to have this short fuse and this was  
22 documented well in their e-mails.

23 Also, in late April, 2008, which is a few  
24 weeks after CRI put their orders on hold with Packgen,  
25 not terminated but put them on hold, there's also

1 evidence of tense e-mails between CRI and Packgen about  
2 two issues. One of those issues has to do with meeting  
3 Department of Transportation regulatory requirements  
4 and one -- the other issue had to do with Packgen's  
5 involvement in dealing with their customers who had  
6 issues related to the accused product.

7 With respect to the Department of  
8 Transportation regulatory issues, we know that as far  
9 back as September of 2007, we know that at least one of  
10 the products did not meet Department of Transportation  
11 regulations and there was a big warning sign across an  
12 internal document discussing how this product didn't  
13 meet Department of Transportation regulatory  
14 requirements. There was another e-mail subsequently  
15 discussing it and then in April of 2008, CRI indicated  
16 to Packgen that it had come to their attention that the  
17 product didn't meet Department of Transportation  
18 requirements.

19 Now, we know that this at least started back  
20 in September of 2007. We asked if there were any  
21 further documents at all related to the Department of  
22 Transportation regulatory issues and were told there  
23 are no other documents, so we don't really know what  
24 happened between September of 2007 and the end of  
25 April, 2008, but we do know that CRI was not happy with



1 Packgen's handling and responses which related to the  
2 regulations and CRI ended up taking the matter into  
3 their own hands.

4 The e-mails with respect to the other issue  
5 that I mentioned, which is the -- Packgen's involvement  
6 with their customers after the alleged incident. CRI  
7 was very terse with Packgen about what their  
8 involvement could be. Packgen very strongly wanted to  
9 be involved in those discussions. There were e-mails  
10 back and forth about it where CRI was very, again,  
11 terse about what their involvement -- what they wanted  
12 it to be and, in fact, it got to the point where the  
13 key person that they had correspondence with at CRI  
14 told them don't -- you can't even contact me anymore,  
15 you've got to talk to somebody else because I'm not  
16 going to even talk to you about this anymore.

17 So that whole series of issues is one thing  
18 that I think would have and should have affected any  
19 forecast or risk profile or term that was used in the  
20 calculation.

21 There is also pricing issues. We know back  
22 in, I believe it was, 2005, CRI had vigorously  
23 questioned a \$2 price increase in the product. In the  
24 fall of 2007, they increased the price of their product  
25 by \$100 and we don't know how CRI reacted to that price

1       increase other than, as Mr. Filler testified, they paid  
2       it for six months, but we don't really know what their  
3       reaction was to that significant a price increase.

4               Beyond that, Mr. Lapoint testified that he  
5       believed he could increase the prices by as much as up  
6       to \$500 or even a thousand dollars from the 196 they  
7       were charging CRI. Well, Mr. Filler believed -- I  
8       think he thinks he was being conservative because he  
9       kept the price at 196, but, in fact, it was apparently  
10      the company's intention to continue to raise the prices  
11      and that would have -- eventually CRI would have said  
12      this doesn't make any economic sense. We don't even  
13      really know how much economic sense the 196 price made.  
14      Mr. Filler indicated he didn't investigate that so  
15      there was a pricing issue.

16             There was also the issue of their very  
17      significant competitor in the form of CHEP. CHEP was a  
18      very aggressive competitor. Ms. Horton testified in  
19      her deposition about their aggressive marketing  
20      techniques, but yet despite this, Mr. Filler just  
21      assumes that CHEP would sit back and allow Packgen to  
22      compete and take away market share and I think that was  
23      not realistic.

24             There is also other things to consider, by the  
25      way, I should have mentioned when I was talking about

1 price, particularly with respect to CHEP. The only  
2 really -- real thing that Mr. Filler accounted for was  
3 how much more economically advantageous the Cougar  
4 product was. Again, he didn't actually investigate the  
5 advantage economically, but there's a lot of other  
6 things that goes into a customer's decision whether or  
7 not they're going to buy a product from one company to  
8 another, many other things, and none of those things  
9 came into it.

10 Additionally, the product was not patented so  
11 they had developed this product, didn't patent it. Mr.  
12 Lapoint testified that he didn't feel it was necessary  
13 to patent it. He wanted to invest his money elsewhere  
14 and also, he felt that they just -- they had 15 to  
15 20 years of protection just by the barriers to entry.

16 Well, certainly CHEP didn't have those  
17 barriers to entry, but also it's clear that the company  
18 does think a patent is important because their website  
19 for years has listed the fact -- or not the fact, has  
20 listed the Cougar bag as being a patented product and  
21 it's not been -- according Mr. Lapoint's testimony,  
22 it's not a patented product.

23 Then there are all the other reasons why  
24 customers weren't buying, significant reasons why 36 of  
25 the 37 customers indicated they were not buying Cougar

1 bags.

2 Q. And those you discussed earlier with the fires?

3 A. Yes.

4 Q. Now, you say that we know all of these various  
5 reasons and how do you know those various reasons?

6 A. Well, I know them on the document that Ms. Horton  
7 prepared. She prepared a list of these 37 refineries  
8 and said why they weren't buying and by the way, when  
9 you're -- as a methodology issue, one of the things  
10 that you want to do when you're trying to predict how  
11 much someone would buy or if they buy or reasons why  
12 they wouldn't is you take a survey and, in fact, I  
13 think we had a survey. We had this survey in the form  
14 of this evidence that Ms. Horton produced.

15 Q. And how would the failure to consider these  
16 issues impact the reliability of a lost profits model?

17 A. I think they impact it hugely. I think you have  
18 a completely unreliable model. If you're including in  
19 your pool of companies that might buy companies that  
20 clearly would not buy, then you have a meaningless  
21 calculation.

22 Q. Does it also impact the determination of the  
23 term?

24 A. Well, sure, and again, with respect to impact of  
25 the term on the refineries, the assumption was once

1       they obtained the customer, they would remain a  
2       customer forever, or at least through the ten-year  
3       term, and that was something that could have been  
4       tested by looking back historically.

5               MR. DUNITZ: I have nothing further.

6               THE COURT: Cross-examination.

7               MR. OLAFSEN: Thank you, Your Honor.

8                       CROSS EXAMINATION

9       BY MR. OLAFSEN:

10      Q.       I've already started with something too heavy for  
11      one arm, I think. Good afternoon, Ms. Fannon.

12      A.       Good afternoon.

13      Q.       You believe that to the extent Mr. Filler applied  
14      a methodology, it was the before and after methodology;  
15      correct?

16      A.       Yes.

17      Q.       And you would agree that the before and after  
18      methodology is, in fact, an accepted methodology used  
19      by damage experts?

20      A.       Yes.

21      Q.       And you would also agree that the sales  
22      projection methodology is also an accepted methodology?

23      A.       Yes, they are. They're both used as ways to  
24      gather evidence to support the damage claim.

25      Q.       And when that evidence is gathered, wouldn't you

1 agree that damage experts can reasonably disagree about  
2 how to interpret the available evidence?

3 A. Yes.

4 Q. And wouldn't you also agree that damage experts  
5 can reasonably disagree about how the available  
6 evidence affects damage calculations in the case?

7 A. Yes. I think there is a line that you cross when  
8 you say they can reasonably disagree about the  
9 interpretation. I think there is a time that you reach  
10 a point where the information is so unreasonable that  
11 it renders a meaningless calculation.

12 Q. But you've seen many cases, have you not, in  
13 which damage experts have reasonably disagreed about  
14 the same evidence?

15 A. Yes, of course.

16 Q. And this is not a math exercise; correct?

17 A. That's right.

18 Q. So since we're not dealing with two plus two  
19 equals four, there's got to be interpretations and  
20 reasonable professional judgments made by damage  
21 experts?

22 A. Yes, along with the procedures that you would  
23 typically do when you're doing such a calculation.

24 Q. And you've seen, for example, that damage experts  
25 often arrive at very different discount rates in the

1 same case?

2 A. Yes, I have seen it.

3 Q. And that competent damage experts often arrive at  
4 very different conclusions as to the amount of lost  
5 profits or whether there even are any lost profits?

6 A. Yes.

7 Q. And you would agree, would you not, that it's not  
8 the role of damage experts to resolve factual disputes  
9 in a case?

10 A. Right. I mean it's not our job to determine --  
11 it is our job to use sufficient relevant evidence and  
12 the best available proof that we can find.

13 Q. But it's not the job of the damage expert to  
14 resolve factual disputes?

15 A. Right.

16 Q. And it's true, is it not, that sometimes damage  
17 experts have to rely on assumptions provided by counsel  
18 on a case?

19 A. Yes. Sometimes they do rely on assumptions that  
20 were provided, but certainly not when those assumptions  
21 are in opposition to other facts and evidence that are  
22 available in the case.

23 Q. It's not unreasonable per se to rely on an  
24 assumption given you by a lawyer in the case; is it?

25 A. If it is at odds with other facts in the case, it

1 is.

2 Q. But assuming the damage expert does not see any  
3 information indicating the assumption is unreasonable,  
4 it's okay to rely on that assumption?

5 A. Yes. I believe it is if the facts support it.

6 Q. And in fact, the damage expert can run damage  
7 calculations using assumptions; correct?

8 A. They can, but thereto, I think you reach a point  
9 where you are really just engaging in a math  
10 calculation; in other words, anybody can run -- you  
11 know, a discounted cash flow analysis is a pretty  
12 straightforward math exercise. Anybody can run a  
13 discounted cash flow method with any training in math  
14 and finance at all.

15 So if you're just running a calculation that's  
16 based on a bunch of assumptions that you've been  
17 provided without testing those assumptions, I don't  
18 know how you're reasonably certain that what you've  
19 determined means anything.

20 Q. But if you're provided certain assumptions and  
21 those assumptions appear to fit with the other evidence  
22 you're seeing, there is nothing wrong with a damage  
23 expert relying on those assumptions to prepare damage  
24 calculations; is there?

25 A. If they fit with the evidence.



1 Q. And it's also true that a damage expert sometimes  
2 has to rely on statements and representations made by  
3 the business that's involved in the case; correct?

4 A. Yes and again, as long as the statements are not  
5 in opposition to facts, other facts in evidence in the  
6 case.

7 Q. I mean if, for example, Packgen had told Mr.  
8 Filler that it was a Fortune 500 company, he couldn't  
9 rely on that statement, obviously, but it's not  
10 unreasonable per se to rely on information you obtain  
11 from a company; is it?

12 A. It should be -- you shouldn't just rely on those  
13 assumptions. I mean it's our job to vet the  
14 assumptions we've been provided and make sure that  
15 they're not in opposition to the evidence provided.

16 Q. If they're not in opposition, it's okay to rely  
17 on them?

18 A. Well, right, but then you're supporting them with  
19 the actual evidence in the case.

20 Q. Wouldn't you agree that the company probably is  
21 the entity that best knows its products and its  
22 industry?

23 A. You know, I have no doubt about that, but the  
24 company also has a great interest in providing you with  
25 rosy projections and information that affects their

1 perspective which is why it's so important to do things  
2 like checking the evidence and the backtesting kinds of  
3 things that I was talking about.

4 Q. But in cases like this, you start off by actually  
5 interviewing the company that's hired you; don't you?

6 A. Yes, of course.

7 Q. And in fact, you spend a lot of time interviewing  
8 company personnel about the case and their products and  
9 the industry and their business?

10 A. As one piece of the evidence that we gather. I  
11 mean we also gather significant documentary evidence,  
12 we look to independent research and so forth to  
13 determine the evidence that we're going to use.

14 Q. I understand that, but it is an important piece  
15 to actually sit down with company representatives and  
16 find out from their perspective what's going on with  
17 this product, with their industry, with their business,  
18 with their financial records?

19 A. Right. I do agree that's an important piece and  
20 again, I want to emphasize in the hundreds of damage  
21 cases that I've been involved in, I can't think of a  
22 business owner that hasn't presented me with a very  
23 rosy picture for their future.

24 Q. Always have an eye open, but nevertheless, you  
25 want that information as part of what you're doing?

1 A. Yes.

2 Q. And it's also appropriate for a damage expert to  
3 rely on other experts; correct?

4 A. Yes.

5 Q. For example, in a case such as this, it would be  
6 appropriate for a damage expert to rely on a materials  
7 expert as to why the product failed?

8 A. Yes.

9 Q. And it would also be appropriate for a damage  
10 expert to rely on an expert in the catalyst industry in  
11 a case such as this?

12 A. Yes.

13 Q. And you wouldn't expect Mr. Filler, for example,  
14 to be an expert in the catalyst industry?

15 A. No, I would not.

16 Q. When a damage expert makes a reasonable  
17 professional judgment as to the significance of the  
18 available evidence, that judgment has to be based, at  
19 least in part, on the expert's experience and common  
20 sense; isn't that true?

21 A. Yes, certainly it does. I mean they've got to --  
22 they've got to know that they have sufficient relevant  
23 evidence.

24 Q. And in this case, Mr. Filler's role here, as I  
25 understand what you're saying, was that he should have

1       considered the available evidence and made a reasonable  
2       professional judgment as to what would have happened at  
3       Packgen but for the alleged damaging action?

4       A.       Well, first I want to pick up on your statement  
5       there that you just said he should have considered the  
6       available evidence. Certainly that's true, consider  
7       what's available, but also make inquiries so that you  
8       make sure you have all of the evidence that you need to  
9       support your claim.

10      Q.       And once someone in Mr. Filler's position gets  
11      all that evidence, then he needs to make a reasonable  
12      professional judgment that's based, at least in part,  
13      on his experience and common sense?

14      A.       Yes.

15      Q.       And that's necessary because what we're trying to  
16      do here is predict a future that never occurred;  
17      correct?

18      A.       Yes. Well, at least with respect to the  
19      refineries. We do know in the future what occurred  
20      with most of the customers.

21      Q.       And as I understand, one of your criticisms of  
22      Mr. Filler is that he did not look for other possible  
23      causes of the losses suffered by Packgen?

24      A.       Other possible causes and issues that would  
25      affect either the forecast or the risk profile of the

1 company or the term over which you would carry out  
2 damages.

3 Q. And in this case, you've done no damage  
4 calculations yourself; have you?

5 A. I wasn't asked to do that.

6 Q. And what you did do though is you went through  
7 all of the documents produced in the case and pulled  
8 out documents that you thought were significant?

9 A. I reviewed Mr. Filler's analysis and the  
10 documents that he relied on. I don't know what you  
11 mean by I went and pulled out.

12 Q. Okay. Well, you've mentioned a number of  
13 documents, for example, an e-mail and things of that  
14 sort. In the documents that we have in this case, you  
15 took some of those documents, put them in your report  
16 and used them as evidence that Mr. Filler didn't  
17 consider that issue?

18 A. Yes. Well, I mean Mr. Filler specifically said  
19 he didn't consider any other issues other than the loss  
20 of CRI, of the alleged incident, so it's not just that  
21 there was documentary evidence showing that other  
22 issues existed, it was the fact that he also said he  
23 didn't consider them.

24 Q. Did you hear him testify last Thursday that he  
25 did consider other possible causes of the losses?

1 A. I heard him say, which I had not heard him say  
2 before, that he considered the fact that CHEP existed  
3 as a competitor.

4 Q. And did you hear him testify that he looked at  
5 other possible causes, including legal or regulatory  
6 matters and he did not see that those affected his  
7 calculation?

8 A. I can't see anywhere in his analysis that he  
9 considered those things. He testified in his  
10 deposition that he did not consider those things.

11 Q. Well, the question was last Thursday, did you  
12 hear him testify that he did consider legal and  
13 regulatory issues?

14 A. Yes.

15 Q. And as I understand what you're saying, Ms.  
16 Fannon, you believe that first, a damage expert in this  
17 case would have to make a reasonable professional  
18 judgment as to whether the issues that you've raised  
19 would affect the damage calculations here?

20 A. Yes.

21 Q. And if the damage expert concludes that they  
22 would affect the damage issues, then the damage expert  
23 has to make a reasonable professional judgment as to  
24 how to quantify that affect in the damage calculation?

25 A. That's right.

1 Q. And would you agree that the issue raised  
2 generally are not susceptible to a mathematical  
3 calculation?

4 A. No, I would not agree with that.

5 Q. Well, let's take a look, for example, at the lack  
6 of patents which you referred to. You believe that Mr.  
7 Filler should have considered whether lack of patents  
8 affected the damages in this case?

9 A. Yes.

10 Q. Now, assuming that that's the case, there's no  
11 particular data that would tell you how to quantify  
12 that affect in damage calculations; is there?

13 A. You know, Mr. Filler testified at his deposition  
14 that when he was asked if he considered patents and he  
15 said he had not, he was asked could that affect his  
16 calculation and he said he agreed, it could, and he  
17 agreed that another company could come along and steal  
18 their ideas and do something with it.

19 Well, that says to me he should have  
20 considered the likelihood of that either in his risk  
21 rate that he applies to his discounted cash flow or in  
22 his actual forecast. Can I tell you exactly right now  
23 how it would have affected the forecast? No, because I  
24 didn't make a forecast, but he admitted himself it  
25 could have affected his calculation, but he hadn't

1 considered it.

2 Q. Well, we will get to the patents in a little more  
3 detail later on, but my question now really is if  
4 patents were an issue here, and you're not saying they  
5 are, but that they could have been; correct?

6 A. Yes.

7 Q. If they were an issue that affected damage  
8 calculation, then the damage expert has to somehow  
9 factor that into damage calculations; correct?

10 A. Correct.

11 Q. And that would include things like reducing the  
12 term from ten years to something less than ten years?

13 A. It might have affected his term, it might have  
14 affected his forecast, it might have affected his  
15 discount rate.

16 Q. And in making that determination of how to  
17 quantify the effect of that, there's no particular data  
18 that you can use to make a calculation; is there?

19 A. No. You would do further investigation of the  
20 issue.

21 Q. And make a professional judgment as to how to  
22 quantify the lack of evidence?

23 A. Yes.

24 Q. Same thing would apply to what you've referred to  
25 as a jaded relationship with Criterion; correct?



1 A. Yes.

2 Q. Once again, there's no particular data that you  
3 would use to quantify that effect?

4 A. There's no particular data, no, but you would  
5 certainly consider it again in your term or in your  
6 discount rate.

7 Q. You'd have to make a reasonable professional  
8 judgment as to what degree that would affect the term  
9 on the discount rate?

10 A. Right, or whether any damages would exist at all.  
11 I mean we know they placed the orders on hold in early  
12 April as they had done in the past. They didn't  
13 terminate them until after there was further tense  
14 conversations about the regulatory issues and the way  
15 Packgen was dealing with their customers.

16 Q. But you have to quantify things that really  
17 aren't readily susceptible to quantification?

18 A. Right, by doing further investigation.

19 Q. Let's talk about what you referred to as a jaded  
20 relationship with Criterion. First of all, you  
21 referred to an e-mail, and we don't have it here today,  
22 but an e-mail in which Criterion vigorously contested  
23 an increase in sale long before this product and my  
24 question is the vigorously questioned is your  
25 characterization; isn't it?

1 A. Yes.

2 Q. And you yourself did not determine whether the  
3 relationship between Packgen and Criterion would affect  
4 the damage calculations in this case?

5 A. I think what I'm saying is that I think further  
6 investigation should have been done into that issue and  
7 taking into consideration the fact that, you know, as  
8 Mr. Lapoint testified, they did have a short fuse with  
9 IBC companies, they just sued another IBC company, so  
10 somehow I think that should have been taken into  
11 consideration.

12 Q. You're aware there is plenty of countervailing  
13 evidence; isn't there?

14 A. I'm aware that they had a relationship with them  
15 for a period of time, if that's what you mean.

16 Q. No. They had been a long time customer before  
17 the product failure; correct?

18 A. Yes.

19 Q. Also, Criterion and Packgen had worked together  
20 to develop this new foil based catalyst container that  
21 was being sold to Criterion; correct?

22 A. Yes.

23 Q. And that this container was customized to  
24 Criterion's needs through this process where the  
25 companies worked together?

1 A. Yes.

2 Q. And that after this new product was brought --  
3 was made available to Criterion, that Criterion then  
4 had six months of purchases, which totaled about a  
5 million and a half during that six months?

6 A. Yes, I'm aware of that.

7 Q. And that at the time of the product failure, that  
8 there was another full month of orders pending that  
9 ultimately were canceled?

10 A. Yes.

11 Q. And you're also aware that immediately after the  
12 product failure, that Criterion terminated its  
13 long-term relationship with Packgen and never bought  
14 anything else from Packgen?

15 A. I don't know how immediate it was. In April,  
16 early April, they terminated their -- or they canceled  
17 their orders and then later in April, terminated the  
18 relationship.

19 Q. A matter of a few weeks, perhaps?

20 A. Yes, but after they had further issues going on,  
21 like the issues of the Department of Transportation and  
22 Packgen's involvement with their customers.

23 Q. We'll get to that. You talked about Mr.  
24 Lapoint's testimony about planned price increases.  
25 Now, it's true, is it not, that Mr. Filler uses

1 historical prices for Criterion rather than Mr.

2 Lapoint's hoped for price increases?

3 A. Yes, he does, but if Mr. Lapoint, in fact,  
4 intended to continue to raise price increases, then  
5 that would have affected the point in time at which CRI  
6 would have evaluated other options as being more  
7 economical.

8 Q. But those price increases never happened, did  
9 they, because of the product failure?

10 A. Right.

11 Q. And you would assume --

12 A. Well, excuse me. Those price increases never  
13 happened.

14 Q. And you wouldn't assume that Mr. Lapoint would  
15 irrationally price himself out of the market; wouldn't  
16 you?

17 A. Well, he indicated he could go as high as 500 or  
18 a thousand dollars and Mr. Filler didn't know really  
19 what the economics of that were.

20 Q. My question is would you expect a businessman,  
21 and in the case of Mr. Lapoint the owner of a company,  
22 to price himself irrationally out of his market?

23 A. No.

24 Q. You also mentioned in your report, I believe, and  
25 discussed today that you don't know how Criterion

1 reacted to the doubling of price from 96 to \$196 in  
2 August of 2007; correct?

3 A. Right. I said other than the fact that they paid  
4 for it for six months.

5 Q. That's what I was going to clarify. They did pay  
6 in this million and a half of sales that started with  
7 the new product, they did pay that price; correct?

8 A. They did pay it, but we don't know how much it  
9 caused them to go back and evaluate the economics of  
10 it.

11 Q. Okay, but they were paying it; correct?

12 A. Yes.

13 Q. And in the month following the product failure,  
14 they had orders for almost \$270,000 at that same price,  
15 orders that they had made?

16 A. I don't recall 270 exactly, but I do know it was  
17 in that order of magnitude.

18 Q. So the answer is yes?

19 A. Yes.

20 Q. And Mr. Filler also considered that Packgen was  
21 selling to Criterion for much less than it was selling  
22 to some other customers; correct?

23 A. I'm sorry, can you say that again?

24 Q. Sure. Are you aware that Packgen was selling to  
25 Criterion at a unit price lower than it was selling to

1 many other customers?

2 A. Yes, I'm aware of that.

3 Q. And the report of Mr. Berman, the catalyst  
4 industry expert, says that there are substantial  
5 economic advantages to the IBC container versus the  
6 flow bin sold by CHEP?

7 A. Yes, I know he said that.

8 Q. And I believe you said earlier that's the sort of  
9 information that a damage expert could rely on?

10 A. Yes, but again, you wouldn't only consider the  
11 economic advantages.

12 Q. Understood. And it's also an important fact  
13 here, is it not, that the only place that Criterion oil  
14 refineries could buy an IBC catalyst container was from  
15 Packgen?

16 A. Yes, of the type that they manufactured. There  
17 were other types of containers that customers could  
18 use.

19 Q. There was the flow bin and the IBC?

20 A. Yes.

21 Q. But nobody else sold the IBC containers?

22 A. Right.

23 Q. Which gets us then to the patents. You would  
24 agree, would you not, that a damage expert wouldn't be  
25 qualified to determine whether a particular design or

1 technology needs to be protected by a patent?

2 A. No, absolutely not. I would agree to that, yes.

3 Q. I was going to -- all right, so you do agree  
4 with that statement. And you had mentioned that you  
5 were aware that Packgen's president testified at his  
6 deposition that there were barriers to entry that he  
7 felt gave him 15 to 20 years of protection?

8 A. Yes.

9 Q. You mentioned earlier today that that wouldn't  
10 protect against CHEP, that CHEP had a whole different  
11 technology and a whole different product; correct?

12 A. They did, but they were already in with the same  
13 customers that Packgen hoped to get in with.

14 Q. But they had a whole different product and they  
15 weren't selling IBC containers, they were selling steel  
16 flow bins?

17 A. Right, an alternative product.

18 Q. And in assessing issues such as patent issues,  
19 the damage expert certainly would be expected to ask  
20 management if management was concerned about patents  
21 and protection of the product?

22 A. Yes.

23 Q. And it would be appropriate to rely on  
24 management, as long as it fit with the other evidence  
25 you saw?

1 A. Right.

2 Q. And you're aware that six years have passed with  
3 the product failure with no competitor putting on the  
4 market an IBC catalyst container?

5 A. I am.

6 Q. And you're not aware of any issue during the last  
7 six years creating any problems for Packgen because it  
8 didn't have patents on its products?

9 A. I'm not.

10 Q. And in fact, Packgen is still selling catalyst  
11 containers; correct?

12 A. Yes.

13 Q. You also referred to a Department of  
14 Transportation issue and that did happen after the  
15 product failure; correct?

16 A. Well, there was a Department of Transportation  
17 issue in the fall of 2007 as well.

18 Q. Are you aware that any issues for the Department  
19 of Transportation were quickly resolved by Packgen?

20 A. I'm aware that Packgen provided CRI with an  
21 answer that had been given by the Department of  
22 Transportation and that CRI wasn't satisfied with that  
23 and they wanted to take it into their own hands.

24 Q. If, in fact, the evidence will be that Packgen  
25 quickly resolved any DOT issues, you would agree, would



1       you not, that that wouldn't affect damage calculations?

2       A.       In part. Again, because there was definitely  
3       some tenseness over this issue between Packgen and CRI,  
4       it could have affected their -- and, in fact, did  
5       affect their attitude towards Packgen.

6       Q.       But you don't know one way or the other whether  
7       that affected anything that went on here, just  
8       something that should have been looked at by Mr.  
9       Filler, according to what you testified to?

10      A.       Right. I mean if that was the ultimate issue  
11      that caused them to stop buying, then that would lead  
12      to a different conclusion.

13      Q.       You also referred to other incidents with the  
14      Packgen catalyst container; correct?

15      A.       Yes.

16      Q.       Are you aware that what had come on the market  
17      and what actually failed was a new type of catalyst  
18      container that was foil laminated?

19      A.       I'm aware that there were fires that were going  
20      on, melting product before the Berry product.

21      Q.       And the Berry product was, in fact, a new version  
22      of the Cougar catalyst container, was it not, as far as  
23      you understand it?

24      A.       Yes. It was made with a different material.

25      Q.       And Packgen representatives testified at their

1 depositions that these incidents you referred to were  
2 isolated incidents; correct?

3 A. Well, they may have been isolated incidents, but  
4 they were the ones that the refineries were referring  
5 to as reasons why they didn't want to buy the product.

6 Q. You were talking to a list that you saw that was  
7 a pre-litigation list of refineries; correct?

8 A. Yes.

9 Q. And Packgen's representatives testified that  
10 after or -- I'm sorry, a pre-incident, I should say  
11 pre-incident, meaning pre-product failure list of  
12 refineries?

13 A. Yes.

14 Q. And Packgen's representatives testified at the  
15 deposition, did they not, that after the product  
16 failure, they believed the reason refineries were not  
17 buying from them was because of the product failure and  
18 rumors that spread relating to that product failure?

19 A. No, actually. When Ms. Horton was asked about  
20 the reasons that were listed on her listing, she talked  
21 about the fires that occurred by putting faulty  
22 material in them. She talked about the CHEP rumors  
23 that had been spread which had nothing to do with the  
24 Berry product.

25 Q. And so you don't recall any testimony that the

1 product failure was the reason that Packgen felt that  
2 this list of refineries that they thought were likely  
3 customers, why those refineries didn't buy it?

4 A. I -- yes, Ms. Horton did testify -- after she  
5 went through explaining her sheet and saying yes,  
6 here's my explanation for various reasons they were  
7 saying and saying that they had to do with the  
8 pyrophoric material that was being put into them and  
9 the rumors by CHEP and explaining what all of that  
10 meant, after -- several pages later in her deposition,  
11 she said oh, yeah, there was the Criterion incident too  
12 that was preventing them, but she didn't have that.  
13 She had that on a few of them on her list, but only a  
14 few of them and if that was a significant concern at  
15 the time, why wasn't that on there? That wasn't listed  
16 as a significant concern that she was providing.

17 Q. That's going to be up to the jury to decide what  
18 these incidents were and how they affected the sales  
19 versus the product failure; correct?

20 A. Well, if you're now trying to say oh, she meant  
21 to put CRI on there, but didn't, I mean to me she was  
22 making that list saying here's the significant issues.  
23 She explained what those significant issues meant in  
24 her deposition.

25 Q. That wasn't my point. My point was simply

1 perhaps there's a factual dispute here and it's not up  
2 to the damage expert to resolve that factual dispute.

3 A. You know, to me the evidence shows what it shows.

4 Q. Okay. You also referred to competition and Mr.  
5 Filler not considering competition; do you recall that?

6 A. At the time of his report, yes.

7 Q. Do you recall Mr. Filler saying that even if the  
8 but for sales had occurred, Packgen would have about a  
9 four percent share of the market catalyst containers?

10 A. Yes.

11 Q. And it's true, is it not, that the competitive  
12 environment in which Packgen was selling catalyst  
13 containers did not change after the product failure,  
14 other than the effects of the product failure?

15 A. Right.

16 Q. For example, there are no new competitors selling  
17 IBC catalyst containers?

18 A. Right.

19 Q. And CHEP is still selling the flow bins?

20 A. That's right.

21 Q. So it's the same competitive environment that  
22 Packgen operated in before the product failure?

23 A. Yes, I understand that and I understand when he  
24 testified that there was going to be something like, I  
25 thought he said, three percent of the market is what

1       they've had, but he also was assuming that they'd be  
2       able to capture 51 percent of the market, of the  
3       refineries that they were going after.

4       Q.       You also referred to companywide costs and a  
5       chart in your report; do you recall that?

6       A.       Yes.

7       Q.       In which you said the companywide cost of sales  
8       ranged from, I think you said, 60 to 65 percent today  
9       and I think your report says 49 to 54 percent; correct?

10      A.       Okay.

11      Q.       So we're looking at companywide costs?

12      A.       Yes.

13      Q.       And this case is involving the foil laminating  
14      Cougar catalyst container; correct?

15      A.       Yes.

16      Q.       And in fact, Mr. Filler had very specific cost  
17      information related to the cost of that particular  
18      product; did he not?

19      A.       Yes. He had two fairly different costs.

20      Q.       And just because that product is perhaps more  
21      profitable than other products Packgen sold doesn't  
22      mean that Mr. Filler's analysis is incorrect in anyway;  
23      is it?

24      A.       No, but I think he should have gone back and  
25      analyzed and compared the historical and inquired and

1       ascertained that this actually was more profitable than  
2       other lines.

3       Q.       Didn't he do that by looking at the cost of this  
4       particular product and factoring only in those costs?

5       A.       Well, what you're telling me then is that they  
6       have significant product lines that they're losing a  
7       lot of money on and I would want to know if that makes  
8       sense, that they're losing money on their other product  
9       lines.

10      Q.       But here what's relevant is the foil based or  
11      foil laminated catalyst Cougar?

12      A.       Yes.

13      Q.       And you also refer in your report to the fact  
14      that there was no written supply contract between  
15      Packgen and Criterion; do you recall that?

16      A.       Yes.

17      Q.       And you're not saying, are you, that a company  
18      can only recover damages if it has a long-term supplier  
19      contract?

20      A.       No, I'm not saying that at all. It would be one  
21      consideration.

22      Q.       You referred to using internal pre-litigation  
23      forecasts for the sales projection method; do you  
24      recall that?

25      A.       Yes.

1 Q. In this case with respect to Criterion, Mr.  
2 Filler actually used, instead of a forecast, actual  
3 sales in the six-months before the product failure; did  
4 he not?

5 A. Right and as I said, that's a terminology issue.  
6 He just used what I would call the before and after  
7 method.

8 Q. But wouldn't you agree that actual sales, as a  
9 general rule, would be more reliable than any  
10 pre-litigation forecast by a company?

11 A. Well, as long as the actual sales that you're  
12 using take into consideration an appropriate time  
13 horizon.

14 Q. You mentioned that companies often have rosy  
15 forecasts that you really can't accept and use when  
16 you're calculating damages.

17 A. Yes, or at least you've got the assumptions in  
18 them.

19 Q. And these standard costs that Mr. Filler used for  
20 the Cougar foil laminated container, there's nothing  
21 inappropriate about a standard cost system; is there?

22 A. No.

23 Q. With respect to the refineries, I understand you  
24 have no opinions on the simulation model or the  
25 software; correct?

1 A. I have no opinions with respect to the simulation  
2 model itself as a statistical model. My report  
3 commented on the inputs to the model.

4 Q. Right, okay. That's what I wanted to make clear.  
5 You rely on Mr. Cowan for the testimony with respect to  
6 the simulation model itself?

7 A. Yes.

8 Q. One of the things in your report that's mentioned  
9 with respect to the refineries is there's no  
10 documentation of a marketing plan by Packgen; correct?

11 A. That's right.

12 Q. And I assume, just like the long-term supplier  
13 contract, you're not saying that a company can recover  
14 damages only if it has a written market plan?

15 A. No.

16 Q. And Mr. Lapoint and Ms. Horton testified as to  
17 marketing plans with respect to the list of refineries  
18 before the product failure?

19 A. Yes. There was a marketing plan that we  
20 discovered was not actually in writing. It was a  
21 marketing plan that Mr. Lapoint had come up with in his  
22 head, but Ms. Horton didn't -- the salesperson didn't  
23 know about.

24 Q. They did say that there was a plan before the  
25 product failure?



1 A. Yes.

2 Q. And that they were implementing that plan?

3 A. Yes, that's what they said.

4 Q. And that in particular, they were trying to sell  
5 this new foil laminated based catalyst container to the  
6 refineries?

7 A. Right. So we -- so we can look and see how they  
8 were actually doing, what was their actual track record  
9 of success in selling to these refineries in 2007, as  
10 well as all of the reasons why the refineries were  
11 telling them they weren't buying.

12 Q. You're aware that this foil based catalyst  
13 container only came on the market in the fall of 2007;  
14 correct?

15 A. Yes.

16 Q. And the refineries -- I'll withdraw that. You  
17 also mentioned that Mr. Filler, choosing a ten percent  
18 chance of success, that you felt that wasn't reliable  
19 with the refineries; do you recall that?

20 A. Yes.

21 Q. Do you recall testimony by Packgen's employees at  
22 their depositions that they had gotten to the point  
23 with these refineries that they felt orders would be  
24 coming soon and sales were imminent before the product  
25 failure?

1 A. I don't recall the specific words, but I do know  
2 what -- we can look and see what their actual success  
3 rate was in getting those customers and again, the  
4 reasons why customers weren't buying.

5 Q. Do you recall Ms. Horton testifying that once she  
6 issues quotes, which is the stage she was at here, that  
7 she has usually an 85 to 90 percent closure rate on  
8 sales?

9 A. Well, she didn't -- she didn't on the refineries  
10 because they were not buying for a whole host of  
11 reasons.

12 Q. Okay. Well, we've already talked about that.  
13 Here's my point. You criticize Mr. Filler for choosing  
14 ten percent chance of success, but, in fact, the  
15 customer, in this case the plaintiff, Packgen, believed  
16 that it had a much higher rate of -- was going to have  
17 a much higher rate of success if it wasn't for the  
18 product failure; correct?

19 A. I know that's what they said.

20 Q. And he didn't blindly accept that; did he?

21 A. What do you mean by that?

22 Q. Well, he came up with a ten percent figure, which  
23 is quite a bit less than what Packgen thought they  
24 would get.

25 A. Which he should have tested against their actual

1 success rate.

2 Q. In your report, you refer to prices with respect  
3 to the refineries and I just want to ask you,  
4 Exhibit 17, I don't know if you need to look at it now,  
5 but that is the exhibit that refers to the 37  
6 refineries, the quantities, the prices and all that  
7 other information; do you recall that exhibit?

8 A. Yes.

9 Q. Would you agree that would be appropriate for a  
10 damage expert such as Mr. Filler to rely on Exhibit 17  
11 for those numbers?

12 A. I want to look at Exhibit 17 because I want to  
13 make sure I'm thinking of the right one.

14 Yes, so you're talking about relying on the  
15 volume of catalyst?

16 Q. And the price and the other information listed in  
17 Exhibit 17.

18 A. Well, in part. I mean I understand that this was  
19 a calculation to sort of backfill how many of these  
20 catalyst containers could the refineries potentially  
21 buy, but the prices on it, I think you need to go back  
22 and look at what the actual prices were that they were  
23 getting.

24 Q. And Mr. Filler did testify, did he not, that they  
25 were selling to other refineries at these prices and

1 even for more than those prices?

2 A. And even for less.

3 Q. Are you aware that Packgen employees have  
4 testified that those prices come from their standard  
5 price list that they use for refineries?

6 A. Yes, but I think it's probably more relevant than  
7 what the prices they actually were getting were.

8 Q. I just want to follow-up on that question. Mr.  
9 Filler testified that he did look at the actual prices  
10 they were getting; did he not?

11 A. Yes, he did. He testified that some were even  
12 more, but some were also even less.

13 Q. You also testified today what you called the  
14 complete destruction of a segment of Packgen's  
15 business; do you recall that?

16 A. Yes.

17 Q. And because of that, Mr. Filler should have done  
18 a business valuation analysis rather than a lost  
19 profits analysis?

20 A. Yes.

21 Q. And isn't it true that Packgen did not have a  
22 destruction of its catalyst container business;  
23 correct?

24 A. I understand what you're saying is that they were  
25 still continuing to sell catalyst containers, but what

1 Mr. Filler testified three times to last Thursday was  
2 that they had a complete destruction of a segment of  
3 their business, of the business related to CRI.

4 Q. And what that meant was Packgen lost a customer,  
5 Criterion, CRI, for its catalyst containers; correct?

6 A. Yes. According to Mr. Filler, that relationship  
7 was completely lost.

8 Q. So we've got a lost customer, not the destruction  
9 of a segment of the business; correct?

10 A. That's not what Mr. Filler said. He said there  
11 was a destruction of the segment of the business.

12 Q. I understand and I'm not going to -- the  
13 transcript will show exactly what he said and how he  
14 used that information, but I'm just trying to establish  
15 for you that there really wasn't a destruction of that  
16 portion of Packgen's business.

17 A. Well, if there wasn't a destruction of that  
18 portion of his business, then where's the point in his  
19 calculation in which he shows them recovering. In his  
20 lost profit calculation, he never demonstrates either  
21 that business recovering through CRI or through any  
22 other customer that might have bought and that would be  
23 a requirement in a lost profit calculation. Otherwise,  
24 you don't have lost profits, you just have that  
25 customer gone forever, which is a complete destruction.

1 Q. Okay. But destruction of a customer  
2 relationship, not the construction -- or destruction,  
3 rather, of a portion of a business; correct?

4 A. Yes. That part of the business is completely  
5 gone. You never think you'll recover it so you've lost  
6 that part of the value of your company.

7 Q. But six years later, Packgen's still selling  
8 catalyst containers; correct?

9 A. Yes.

10 Q. And they're selling them to customers such as  
11 international refineries and even some of these North  
12 American refineries; correct?

13 A. Right. So where is the point that he's saying  
14 they're going to recover to what they are? He's saying  
15 they're never going to recover this piece of the  
16 business, it's permanently lost.

17 Q. You also referred to mitigation and it's true, is  
18 it not, that in the refinery simulation, Mr. Filler  
19 uses as mitigation actual sales to those refineries  
20 during the last six years?

21 A. During the first -- he uses actual sales for the  
22 first 5 or 6 years and then he forecasts what they are  
23 beyond that, but we don't know how much he forecasts  
24 because he didn't provide that.

25 Q. We are only six years down the road, but my point

1        simply is he has mitigated the refineries damages by  
2        decreasing those damages by the amount of actual sales  
3        to these refineries?

4        A.        Yes.

5        Q.        And for the next four years in his model, he  
6        reduces damages based on expected mitigating sales to  
7        these refineries?

8        A.        Yes.    We don't know how much that is because  
9        that's not an output of the simulation model so we  
10       don't know what he's predicting mitigating sales would  
11       be.

12       Q.        Okay.    Well, I disagree, it's right there in 13A,  
13       but I would rather move on so we can finish up on time  
14       today.

15                        With respect to CRI then, the complaint is  
16       there are no mitigating sales to CRI, but, of course,  
17       as you understand it, there have been no sales to CRI  
18       since the product failed?

19       A.        Exactly, which is a complete destruction in that  
20       portion of the business.

21       Q.        You referred to Mr. Filler's testimony that one  
22       factor he considered was that sales to CRI would -- had  
23       credibility to the refineries and helped with refinery  
24       sales if the product failure hadn't occurred?

25       A.        I heard him say that.

1 Q. He considered other factors as well; did he not?

2 A. In sales to refineries?

3 Q. That's correct.

4 A. First of all, I want to again say if it can go  
5 that way, it can go the other way as well. In other  
6 words, if the refineries saw him pulling up or saw CRI  
7 pulling up with a Cougar bag, and that was his theory,  
8 right, that if the refineries see them pulling up with  
9 a Cougar bag, it would be a stamp of approval. Well,  
10 it could also be the opposite.

11 If the refineries are not buying for any  
12 reasons, then saying CRI, we don't want that bag, but  
13 we don't even know how many of those refineries were  
14 buying from CRI to begin with.

15 Q. My point simply is what Mr. Filler testified to  
16 about the CRI bags being at the refineries was one of  
17 the factors he said he considered.

18 A. I don't remember what else he said he considered.

19 Q. With respect to the Pratt's Stats database and  
20 your testimony that those companies were inappropriate  
21 companies to use, I think you did acknowledge that Mr.  
22 Filler used the code from the Packgen tax return to  
23 determine what types of companies to look at; correct?

24 A. Yes.

25 Q. And in fact, tax returns require a code to be put



1 on identifying a company by certain categories that the  
2 IRS has established?

3 A. Yes. I'll also add, though, that there's a great  
4 deal of research that shows that selection of  
5 comparable companies in transactions by SIC code alone  
6 is not as effective -- or does not prove as effective  
7 as selection of comparable companies by other metrics.

8 Q. You heard him say he thought for not only the  
9 reasons of the code, but other reasons as well, that he  
10 thought those were appropriate companies to use?

11 A. I don't recall what his other reasons were.

12 Q. But you disagree with him and feel he should have  
13 relied on other information?

14 A. Well, I mean my main issue -- well, yes. Yes, I  
15 mean I think he should have considered companies that  
16 had a more similar risk profile, but I also disagree  
17 with his application of that multiple or his  
18 interpretation of what that multiple means.

19 Q. When you were referring to the -- what you call a  
20 tense relationship between Packgen and CRI, were you  
21 aware or are you aware that CRI actually had passed  
22 along to Packgen that they were very pleased with the  
23 new custom product that was being sold after October of  
24 2007?

25 A. I don't recall seeing that, but that doesn't

1 surprise me given the fact that they bought it for six  
2 months.

3 Q. And very systematic sales; correct?

4 A. I don't know if I would call it systematic.

5 Q. Consistent?

6 A. Consistent for those six months.

7 MR. OLAFSEN: No further questions. Thank  
8 you.

9 THE COURT: Thank you.

10 MR. BIXBY: Can we have just one moment?

11 THE COURT: Sure. Redirect?

12 MR. DUNITZ: Yes.

13 MR. OLAFSEN: I have one more trip to make,  
14 sorry.

15 REDIRECT EXAMINATION

16 BY MR. DUNITZ:

17 Q. Ms. Fannon, on this issue of destruction of the  
18 segment of the business, do you know whether the Cougar  
19 that was being sold to CRI/Criterion was a different  
20 type of Cougar than to the refineries?

21 A. I know they were selling -- oh, yes, to the  
22 refineries, yes.

23 Q. And was one a spent catalyst Cougar and the other  
24 a fresh catalyst Cougar?

25 A. That's my understanding.

1 Q. And do you recall last Thursday whether Mr.  
2 Filler testified about mitigation regarding the fresh  
3 catalyst Cougars to the ones sold to CRI?

4 A. Yes, he did testify about that. He indicated  
5 that he had made no investigation into mitigation.

6 Q. And so if they are not selling any fresh catalyst  
7 Cougars any longer, the fact that they're selling other  
8 types of Cougars to other industries, does that impact  
9 whether the destruction is the appropriate -- the  
10 destruction of a segment of the business is the  
11 appropriate method?

12 A. Well, even if they were selling -- even if they  
13 were selling the same Cougar to other customers, the  
14 issue was more the complete destruction of their  
15 relationship with this particular customer. It was  
16 just completely gone now so that would lead you to a  
17 conclusion of the loss of business value calculation.

18 Q. And if it was -- I believe Mr. Filler testified  
19 that he was not aware of any additional fresh catalyst  
20 Cougars sold at all, so would that suggest that the  
21 appropriate measure for the fresh catalyst is the  
22 destruction of the -- of that segment of the business?

23 A. That would additionally suggest that, yes.

24 Q. Now, Mr. Olafsen asked you about the role of  
25 experts resolving factual issues. Is the lack of

1 mitigation regarding fresh catalyst Cougars a factual  
2 issue or is it an issue that goes to what model of  
3 damages to use?

4 A. Well, it's an issue of model because if you  
5 believe that the sales, that the loss of sales is going  
6 to be mitigated, you eventually have two lines coming  
7 together, your forecasted line and where they're now  
8 going to get to. So it's a methodology issue because  
9 that second part of the calculation is just missing.

10 Q. And you agree that -- you agree with Mr. Olafsen  
11 that both the before and after and the sales projection  
12 methods are accepted methods; is that correct?

13 A. Yes.

14 Q. Did Mr. Filler actually apply either of those  
15 methods?

16 A. Well, you know, again, this is a matter of  
17 terminology. He -- I would have said he used the  
18 before and after method because he was relying on a  
19 six-month before picture in order to make his ten-year  
20 projection.

21 Q. But if he was using that for a lost profits  
22 analysis, wouldn't he need to show mitigating sales as  
23 well?

24 A. Yes.

25 Q. So if he did use the before and after method, did

1 he leave part of that method out?

2 A. Well, the part he left out was -- he relied on  
3 the prior six months to show what his sales would have  
4 been but for the alleged incident. He would have then  
5 also needed to do a separate forecast that showed what  
6 he now expected the company to do.

7 Q. And without showing what he expected the company  
8 to do, is that a reliable lost profits model?

9 A. It's not.

10 Q. You also -- Mr. Olafsen discussed with you your  
11 interviewing company personnel and that is part of your  
12 method; correct?

13 A. Yes.

14 Q. And do you always test against what the company  
15 has told you?

16 A. Yes.

17 Q. And when you're interviewing the company, are  
18 those intensive interviews?

19 A. I mean, yes. They are detailed examination with  
20 company personnel about financial issues, the company's  
21 business and so forth.

22 Q. Do you rely on your memory when you take those?

23 A. Never, never. I mean, you know, you're  
24 interviewing the company about, as Mr. Filler  
25 testified, all of the things that affect your

1 calculation. I can't keep it all -- all that in my  
2 head.

3 Q. The prices are different -- according to their  
4 price schedule, prices are different for the Cougars  
5 sold to CRI and the Cougars sold to the refineries; is  
6 that correct?

7 A. Yes.

8 Q. And are those different products?

9 A. Yes.

10 Q. Did Mr. Filler at his deposition indicate whether  
11 he knew the difference between those products?

12 A. I'm not --

13 MR. OLAFSEN: Your Honor, objection. I'm not  
14 sure why he gets to characterize what he said at the  
15 deposition. The deposition should speak for itself.

16 THE COURT: Do you want to rephrase it?

17 BY MR. DUNITZ:

18 Q. Do you have any evidence that shows Mr. Filler  
19 knows the difference between the two products?

20 A. Not at the time he issued his report.

21 Q. If you're not qualified to render opinions  
22 regarding patent and how that would impact the value of  
23 a product, what would you do in that circumstance?

24 A. Well, I think what I -- again, I didn't make  
25 this calculation and I didn't do the additional

1 investigation because I was not asked to make my own  
2 calculations, so my comments with respect to that were  
3 that I would have investigated the importance of a  
4 patent in this industry and, as Mr. Filler acknowledged  
5 in his deposition, he acknowledged that there was a  
6 risk that someone else could steal their design, so I  
7 would have pursued that to see what kind of an affect  
8 that might have had.

9 Q. Mr. Olafsen asked you about the barriers to entry  
10 and suggested that, I believe, that Mr. Lapoint could  
11 identify the length of time that the barrier would be  
12 in place. Do you know what Mr. Filler's lost profit  
13 damages are for this case?

14 A. They're around -- I believe now they're around  
15 six and a half million.

16 Q. And that's over a ten-year period; is that  
17 correct?

18 A. Yes.

19 Q. And do you have any opinion about whether -- how  
20 that would impact the barrier's ability to earn  
21 6.6 million over ten years?

22 A. Well, I certainly think if the company thought it  
23 could earn 37 percent profitability on this and make  
24 that much money, I think there's a lot of incentive for  
25 a company to get involved in this line of business.

1 Q. And you were asked about if you were to find out  
2 that Packgen quickly responded to the DOT issues,  
3 whether you -- how that would impact your decision.

4 Is there any evidence that you've reviewed  
5 that shows what happened with the DOT issue?

6 A. No. In fact, we specifically requested to know  
7 if there was any further documents at all that would  
8 give us an indication of how that issue was resolved.  
9 We were told there was nothing other than what we had.

10 Q. If this is a new product as was represented on  
11 cross, the product they were selling to the refineries,  
12 and would the prior sales success rates be relevant  
13 even if it was a new product?

14 A. Well, I mean what I would characterize this is a  
15 continually evolving product because they had been  
16 making changes and updates and upgrades to it since at  
17 least as far back as 2004, so it was a continually  
18 evolving product.

19 Q. And if it is a new product, would a market survey  
20 be an appropriate way to find out what the success rate  
21 would be?

22 A. Yes, it would certainly be one way to determine  
23 how that product would be received and again, as I  
24 commented earlier, I think with respect to refineries,  
25 we had at least a part of what a marketing survey would



1 look like.

2 Q. At the time of the incident, do we know what the  
3 market share of Packgen was?

4 A. I don't recall. I only recall that with respect  
5 to the refineries in the first year it was forecast, he  
6 had forecast that it would be about eight percent of  
7 the refinery revenues.

8 Q. Assuming that Mr. Filler's calculation that once  
9 they've got the 37 refineries, it would be four percent  
10 of the market, is it safe to assume that at the time of  
11 the incident, the market share was less than four  
12 percent?

13 A. Well, certainly because he has a rapidly  
14 increasing amount of the market that they're going to  
15 be capturing.

16 Q. And even with less than four percent of the  
17 market, how did Ms. Horton describe CHEP's competition  
18 in this market?

19 A. She described them as an extremely aggressive  
20 competitor. She complained about their marketing  
21 tactics. She talked about how they engaged in tactics  
22 of contacting all of their customers at trade shows and  
23 so forth, by slipping brochures under their doors,  
24 pointing out the advantages of the flow bins over the  
25 Cougar products.

1 Q. So based on that, as Packgen attempted to  
2 increase their market share, would you expect that the  
3 competition would remain at least that aggressive?

4 A. Most certainly.

5 Q. Mr. Olafsen was discussing the costs with you and  
6 the fact that this was -- the foil laminated Cougar was  
7 a new product and so that the profitability of that  
8 could increase. You mentioned in your response that  
9 they were losing money on other products?

10 A. Well, they must have been. If this one was so  
11 profitable, that meant that they were losing money on  
12 other products.

13 Q. And how did you determine that?

14 A. Well, because if the overall average is  
15 49 percent to 54 percent costs and what's being used  
16 for this product is only 40 percent costs, that means  
17 that other products have to offset that and be 60 or 70  
18 percent costs.

19 Q. And if they're losing -- if the model you're  
20 using suggests they're losing money on other products,  
21 is there additional testing you would do to check on  
22 the profitability of that product?

23 A. Yes. That's what I would investigate. I'd want  
24 to make sure that it tied back to the total.

25 MR. DUNITZ: Nothing further, Your Honor.

1 THE COURT: Mr. Olafsen?

2 MR. OLAFSEN: Thank you, Your Honor.

3 RECROSS EXAMINATION

4 BY MR. OLAFSEN:

5 Q. Ms. Fannon, do you believe that there are  
6 separate catalyst containers manufactured by Packgen  
7 that can be used only for fresh catalyst and others  
8 that can be used only for spent catalyst?

9 A. It's my understanding that they're two different  
10 products for fresh and spent catalyst.

11 Q. Would you be surprised to learn then that fresh  
12 and spent catalysts can be used in these Cougars  
13 regardless of the product being sold to Criterion or  
14 being sold to the refineries?

15 A. I didn't know that, but it would surprise me in  
16 the sense that the costs of the two products was listed  
17 as different costs.

18 Q. Well, are you aware that the reason the cost was  
19 different is that the refineries sold to the -- I'm  
20 sorry, the Cougar catalyst containers sold to the  
21 refineries were, in fact, significantly larger  
22 containers?

23 A. Okay, but then they're different products.

24 Q. The point simply is there's no sharp line between  
25 fresh catalyst and spent catalyst. The difference is

1 size of product, not the use.

2 A. Okay.

3 Q. You mentioned the DOT issue, but no further  
4 documents were forthcoming, but Mr. Lapoint did testify  
5 at his deposition about that DOT issue being resolved;  
6 did he not?

7 A. I don't recall what he said.

8 MR. OLAFSEN: No further questions.

9 THE COURT: Anything further, Mr. Dunitz?

10 MR. DUNITZ: All set, Your Honor.

11 THE COURT: Thank you. Thank you, ma'am. You  
12 may stand down. How do we want to proceed?

13 MR. BIXBY: That's it for our two witnesses.  
14 I think we should talk about briefing schedules and  
15 page limitations and things like that.

16 MR. OLAFSEN: We do have rebuttal testimony  
17 from Mr. Filler.

18 THE COURT: Okay. Do you want to do that now?

19 MR. OLAFSEN: I think that makes sense, Your  
20 Honor.

21 THE COURT: Okay.

22 MR. OLAFSEN: The plaintiff calls Mark Filler  
23 back to the stand.

24 (Witness Mark G. Filler previously sworn).

25 THE COURT: You are still under oath. Thank

1       you.

2                               DIRECT EXAMINATION

3       BY MR. OLAFSEN:

4       Q.       Good afternoon, Mr. Filler.

5       A.       Good afternoon, Mr. Olafsen.

6       Q.       You were present, of course, when Mr. Cowan  
7       testified on Thursday?

8       A.       Yes, I was.

9       Q.       You have issues that you would like to respond to  
10      Mr. Cowan's testimony?

11      A.       Yes, I do.

12      Q.       Could you tell us what those issues are.

13      A.       Well, first of all, Mr. Cowan is comparing apples  
14      to oranges. He's testifying -- he testified about the  
15      use of simulation where there are a myriad of past data  
16      points, in the hundreds of thousands, if not the  
17      millions. He said that because he had all this past  
18      data and this huge amount of data, that he was able to  
19      test and verify the results of his simulation because  
20      he could compare it with this past data, but that's not  
21      the only use of simulation.

22               As a matter of fact, the first time I ever saw  
23      simulation was in a Brealey & Meyers corporate finance  
24      text, which is one of the most widely known, most cited  
25      corporate finance textbooks in the United States, and

1       20 years ago, Brealey & Meyers said that corporations  
2       were using simulation because they had found out that  
3       using simple point estimates to determine whether or  
4       not they should invest in a project or not was causing  
5       them problems because with that simple point estimate,  
6       they then had to guess at what the discount rate would  
7       be for each single project that they were going to  
8       attempt to invest in.

9               When simulation came along, they could make  
10       the inputs random variables and then take the result of  
11       each project and discount it back to present value at  
12       the company's average weighted cost of capital and then  
13       make an investment decision on which projects had the  
14       highest present value.

15              In those situations -- for instance, if an  
16       airline is going to decide -- trying to decide whether  
17       it should open a route from Portland to Montreal, what  
18       they don't do is go ahead and do it and then see how  
19       things work out. They use simulation to account for  
20       all of the uncertainty in the input variables and then  
21       they make a decision.

22              In this case, that's exactly what I've done  
23       with Packgen. I've used the examples that I found in  
24       Brealey & Meyers, I found the examples that I found in  
25       the other books in my library, but that still leaves us

1 with the issue well, how do we know that the results  
2 are accurate if we can't compare it with past data.

3 Well, simulation provides an answer to that.  
4 My Exhibits 13, 14, 15 and 16A show the average output  
5 for each year for unit sales, dollar sales and lost  
6 profits and it also has the standard error, which is  
7 the -- well, the average deviation, and if you wanted  
8 to have a 95 percent confidence interval, you would  
9 take the standard error and multiply it by two, or if  
10 you wanted to state it in a percentage, we take the  
11 standard error, divide it by the average and multiply  
12 by two. When you do that with unit sales, you get a  
13 95 percent confidence interval of somewhere between 1  
14 and 3 percent.

15 Q. So that's a way of testing that Mr. Cowan did not  
16 refer to?

17 A. That's right. He didn't refer to that and you  
18 get the same 95 percent confidence interval for dollar  
19 sales and what does a 95 percent confidence interval  
20 say? It says that I'm 95 percent confident that the  
21 number that I'm predicting falls within this range and  
22 that it has a two and a half percent chance of being  
23 less than one and a two and a half percent chance of  
24 being greater than three.

25 When we get to lost net profits, the

1 confidence integral is wider because instead of just  
2 simulating one random variable, unit sales and dollar  
3 sales, we're simulating six unit variables, unit sales,  
4 dollar sales -- price and the for costs, so that makes  
5 the confidence integral wider and for the appropriate  
6 years, those confidence integrals range from 3 to  
7 10 percent to the average is 5. Another way of saying  
8 that is that my conclusion of lost profits of  
9 approximately a million 900 thousand dollar could vary  
10 plus or minus 5 percent.

11 Now, I know that the Court wants a single  
12 number, but just as value is always a range, so is  
13 damages a range and the question is, is the model and  
14 the calculations reliable and I think the answer is  
15 yes, if the confidence integrals are narrow enough.

16 Q. The types of simulations Mr. Cowan was saying he  
17 did, do they involve many more data points than a  
18 business profit type calculation?

19 A. Oh, yes. When you're using census data or  
20 unemployment data, you're dealing with many, many years  
21 and hundreds of thousands, if not millions of data  
22 points within each year.

23 A simulation for a business that is talking  
24 about whether or not it should make a decision to  
25 invest in a project and wants to know the answers to



1     what's the worst that could happen, what's the  
2     probability of success and what's the most important  
3     variable, there is no past data.

4             When I said there was no past data, what I  
5     meant was there is no prior sales history that you can  
6     compare your forecast to. We do have data in the  
7     Packgen matter. We have data concerning a hundred  
8     percent needs of the 37 refineries. We know what the  
9     quoted prices were and we know what the for costs were.

10            So it's not like we are guessing at these  
11     things. Those are facts and data that we know and  
12     those are the facts and data that I put into the model.

13     Q.     Do you recall that Mr. Cowan also talked about  
14     your ten percent success rate as a method to determine  
15     when the first year of sales begins to a refinery?

16     A.     Yes. That's a nice way to put it and he also  
17     said that the use of that model generated increasing  
18     sales over time, so at the end of the tenth year, we  
19     got to 50 percent and so you have to ask yourself well,  
20     what's wrong with that? Wouldn't -- the expectation  
21     would be that in the first year, if you sold to two  
22     refineries and kept them, the next year you would sell  
23     to two more and two more and two more so that over  
24     time, things would build up and get you to a point  
25     where you, after ten years, it's not unreasonable to

1 think that you would capture 50 percent of that  
2 particular market for the 37 refineries.

3 I did not forecast years 11 through 20.  
4 They're not in evidence and I'm sure that I would have  
5 used a different model to calculate what would have  
6 happened after year ten.

7 Q. Mr. Cowan referred to what you had done with the  
8 simulation for the refineries as a straightforward  
9 mathematical calculation; do you recall that?

10 A. Yes and that's what I did with the aid of the  
11 computer. I didn't need XLSim software. What I could  
12 have done was calculate 5,000 deterministic models and  
13 written it down on pencil and paper and gotten the  
14 totals for each of the ten years and taken an average.

15 I might have used XL to help me choose which  
16 unit sales within that range, what unit price within  
17 that range and which each of the for costs within that  
18 range I was going to use to calculate what the lost  
19 profits would be for that trial and I would do that  
20 again and again and again until I had done 5,000  
21 trials. If I could make two calculations a minute, it  
22 would probably have taken me at least a year. The  
23 computer does it in 120 seconds.

24 So it's really just a straightforward math  
25 calculation with a bit of assist from the computer as

1 to which random variable gets chosen for each of the  
2 5,000 trials within the six random variables that are  
3 in the model.

4 Q. You recall Mr. Cowan's testimony about the  
5 possibility of all 37 refineries placing an order  
6 within the first year?

7 A. Yes and he said if you calculated that by .1 to  
8 the 37th power, well, that's -- when you write that  
9 out, that's a decimal point, 36 zeros and a 1. That's  
10 a very small number. The chance of an asteroid hitting  
11 the earth, I understand, is a chance of 1 in a million.  
12 That's a decimal point and seven zeros and then a 1.

13 So 1 to the 37th power is so small, it is so  
14 remote, you wouldn't even consider it, just like we  
15 don't plan our daily lives on the chance of 1 in a  
16 hundred million that an asteroid would hit the earth  
17 and wipe us out as it did the dinosaurs 65 million  
18 years ago.

19 Even if it did happen, Packgen has the  
20 capacity, in terms of floor space, machinery and  
21 people, to meet that need. It would be, I believe,  
22 25,000 containers a year, which is double the rate that  
23 they were selling to Criterion. It's not a huge  
24 number.

25 Q. Dr. Cowan referred in his testimony to the wrong

1 parameters leading to the wrong opinions; do you recall  
2 that?

3 A. Yes and in his report, when you read it, he  
4 refers to parameters as random variables and if you  
5 change the random variables, that is, if you change the  
6 unit sales, if you change the unit selling prices, if  
7 you change the cost, you'll get a different answer.  
8 That's all that he meant by the word parameter.

9 It doesn't refer to reliability, it doesn't  
10 refer to probability distributions, it's just the  
11 inputs, the random variables that go into those  
12 probability distributions.

13 Q. Mr. Cowan also testified about your use of a  
14 regression model for calculating overhead.

15 A. Yes. I testified that I knew that the regression  
16 model was not statistically significant, but I used it  
17 to facilitate my computation or to facilitate my  
18 allocation of overhead among the three broad sales  
19 categories for Packgen, which was sales to Criterion,  
20 sales of Cougars to refineries and all the other  
21 products that Packgen made and sold which, for the six  
22 months of October of '07 through March of '08, those  
23 other products was a million dollars in sales in just  
24 those six months. So if I had just taken a simple  
25 average of overhead and allocated it, the answer

1 wouldn't have changed.

2 Q. Dr. Cowan also testified that you didn't account  
3 for competition and other external factors; do you  
4 recall that?

5 A. Yes.

6 Q. And do you agree with that testimony?

7 A. No. No, I don't agree with that  
8 characterization. The only -- the only competitor that  
9 Packgen had was CHEP. There was no other IBC  
10 manufacturer then nor today. So knowing what -- how  
11 CHEP would push back, that's why my success rate was  
12 only ten percent because I was accounting for that in  
13 the ten percent factor.

14 Another thing we have to -- all the other  
15 things he listed, you know, technology, et cetera,  
16 that's what the discount rate is for. There is no way  
17 to put a number on those things and build them into the  
18 model. You know they're there and that's why your  
19 discount rate is as high as it is because those are  
20 everyday, ordinary business risks that any business  
21 faces and that's where you account for them, in the  
22 discount rate. If there were no risk, the discount  
23 rate would be five percent. It would be the risk free  
24 rate of a Treasury bond.

25 Q. There was also testimony from Mr. Cowan about

1     your distribution in the refineries simulation model.  
2     Can you explain what distribution rate you used and why  
3     you used them.

4     A.     There are many, many distributions. Typically  
5     for simulations to businesses as I did with Packgen,  
6     you would find, perhaps, four distributions; the normal  
7     distribution, the triangular distribution, a uniformed  
8     distribution and a discrete distribution and let me  
9     explain briefly what each of those is.

10           A discrete distribution says that there's a  
11     40 percent chance of this number, a 40 percent chance  
12     of that number and a 20 percent of that number and  
13     those percentages have to add to 100 percent and they  
14     can be any combination of percentages, as long as they  
15     add to 100 percent, so that's the discrete  
16     distribution.

17           The continuous distributions are the uniform  
18     distribution that says that any number between the  
19     lower bound and the upper bound has an equal chance of  
20     appearing. The distribution looks like a rectangle.

21           The third distribution is the triangular  
22     distribution, which we talked about last Thursday,  
23     which answers the question what's the most likely  
24     number, what's the best-case number, what's the  
25     worst-case number and the distribution will provide a

1 number anywhere in between, but generally producing a  
2 number closer to the most likely number.

3 And the fourth distribution is the bell-shaped  
4 curve, the normal distribution, for which you need an  
5 average and a standard deviation to compute.

6 In the Packgen model, I used two of those  
7 distributions. I used the triangular distribution for  
8 unit sales, for unit prices and for three of the costs.  
9 For the fourth cost for which I did have history, that  
10 is, the overhead figure, I had six months of normalized  
11 overhead numbers. Those overhead numbers were normally  
12 distributed so I used normal distribution to calculate  
13 my overhead.

14 Q. And just if you could quickly summarize why you  
15 believe the triangular distributions were appropriate  
16 to use in this situation.

17 A. The triangular distribution was appropriate to  
18 use because it deals with the fundamental question that  
19 any competent business owner can tell you; what's most  
20 likely to happen, what's your best-case scenario,  
21 what's your worst-case scenario. They can answer that  
22 question.

23 They can't tell you how any number is normally  
24 distributed, they can't tell you what is a discrete  
25 distribution, but they can give you the information

1       that allows you to use a triangular distribution.

2       Q.       And Mr. Cowan criticized one of the  
3       distributions, price distribution, because it wouldn't  
4       allow a price lower than your worst-case scenario; do  
5       you recall that testimony?

6       A.       Yes.

7       Q.       And do you believe his testimony, the testimony  
8       of Mr. Cowan was appropriate?

9       A.       No, I don't think so. I don't think he  
10      understood what's going on here. Once Packgen quotes  
11      to a refinery \$369.95, that refinery cannot pick up the  
12      phone and call another IBC manufacturer and say I have  
13      a price here, can you beat it. There's no place to go  
14      but to either accept Packgen's price and place the  
15      order, or to continue to use the higher cost rental of  
16      flow bins.

17               What I did with price was the best-case was  
18      the quoted price. The worst-case was a five percent  
19      discount, which Mr. Lapoint told me he was willing to  
20      do to close the sale, and the worst-case was another  
21      five percent discount, which was as low as he was  
22      willing to go to make a sale. If he dropped any lower,  
23      word would get out very quickly and everybody would  
24      want that price.

25               So that's why there's no reason for prices to



1 be higher because those are the list prices and the  
2 prices that were being quoted and there's no reason for  
3 it to be any lower than what I used in my triangular  
4 distribution for the reason I just said.

5 Q. In his report, Mr. Cowan does an analysis of  
6 certain material cost files; do you recall reading  
7 that?

8 A. Yes.

9 Q. Do you agree with his analysis?

10 A. No, no. Those cost files are not real costs or  
11 they don't come out of the general ledger. They are  
12 not the numbers from the general ledger that would say,  
13 you know, we purchased this amount of material for this  
14 product, we made so many of this product and here's our  
15 average cost.

16 What Packgen does is it takes the standard  
17 cost sheets and somebody plugs those in for information  
18 purposes. That's number one. Number two, those sheets  
19 went back to 2003, '4, '5, and '6 and into 2007 with  
20 different older products, different products.

21 You remember, these Cougars changed from  
22 single layer to double layer to laminated foil. They  
23 were a product in motion so you can't go back and look  
24 at what was done 2, 3, 4, 5 years ago and say this is  
25 what we're going to rely on. What you've got to do is

1 take a snapshot of what was actually happening in those  
2 six months and that's what I did.

3 Q. Dr. Cowan's report also says that only the first  
4 year of your simulation was actually simulated and then  
5 the values were copied in file years; do you recall  
6 that?

7 A. Yes.

8 Q. Do you agree with that testimony?

9 A. Well, that testimony refers to something that's  
10 not in evidence. That was the Criterion simulation.  
11 There was a reason for doing that, I won't get into it  
12 because that opinion was withdrawn. It's not directed  
13 at the simulation for the refineries.

14 Q. With respect to the refineries then, was that  
15 actually simulated each year into --

16 A. Yes. Each year was simulated. That criticism of  
17 the refineries is invalid.

18 Q. Thank you. Ms. Fannon today testified about what  
19 she described as the complete destruction of a segment  
20 of Packgen's business; do you recall that?

21 A. Yes.

22 Q. And how that would affect how determination of  
23 damages should be done; do you agree with her  
24 testimony?

25 A. No at all.

1 Q. And would you explain why.

2 A. My testimony last Thursday said that what was  
3 destroyed was this customer relationship, not a segment  
4 of the business, not a division of the business. The  
5 plant didn't burn down. This customer relationship was  
6 ended. The loss became infinite and rather than take  
7 it out to infinity, I simply cut it off ten years and  
8 discounted it back to present value and there's no  
9 reason -- there would be no reason to do it on an  
10 after-tax basis because the loss was not to the  
11 shareholders. The loss was to the business.

12 If Packgen collects on this claim, it will pay  
13 taxes on the proceeds. If the cash flow has already  
14 been made smaller by subtracting out taxes, that's a  
15 double hit. So lost profits is always on a before-tax  
16 basis with an after-tax cash flow. That's the way it  
17 worked. I treated this as lost profits from a  
18 relationship that was no longer going to -- that  
19 wasn't going to continue. It was over, it was done.

20 Q. When a business valuation is done, when a  
21 business or a personal business is destroyed, what type  
22 of situations are used for that type of business  
23 valuation?

24 You referred to a plant burning down, is that  
25 a --

1       A.       Oh, for instance, if -- let me make a  
2       hypothetical situation. A restaurant burns down,  
3       there's no insurance, the arsonist is convicted,  
4       there's a civil suit and in addition, the loss to the  
5       shareholders, if that's what you want to calculate,  
6       would be the value of the business. But again, if  
7       you've got a corporation and the loss is to the  
8       corporation, it would still be on a before-tax basis.  
9       The corporation would collect the proceeds, pay its  
10      taxes and distribute the money to the shareholders.

11      Q.       There was also testimony from Ms. Fannon about  
12      mitigation and I would like to ask you first about the  
13      refineries. Was mitigation used to the entire ten  
14      years of your refineries model?

15      A.       Yes. For the years that we had actual sales, I  
16      plugged in the actual unit sales in dollars from sales  
17      to those 37 refineries. For future years, I calculated  
18      and put in the model what was necessary to produce  
19      expected mitigating sales so by the time we got to the  
20      tenth year, lost profits was theoretically zero.

21      Q.       And with respect to CRI, was there any mitigation  
22      to plug into that model?

23      A.       When I inquired as to mitigation, the only --  
24      the answer that I got was adjust the refineries.

25      Q.       Does that mean there had been no sales to CRI or

1 other fresh catalyst companies, as you understand it?

2 A. As I understand it, there had been no sales to  
3 CRI, there had been no sales to any other fresh  
4 catalyst producers or anybody who produced the same  
5 kind of fresh catalyst that CRI made.

6 Q. Ms. Fannon also testified about you relying on  
7 Criterion purchases going to refineries and adding  
8 credibility to Packgen; do you recall that testimony?

9 A. Yes.

10 Q. Can you explain what you meant when you testified  
11 to that last Thursday?

12 A. Well, yes. This new Cougar, which was developed  
13 in the summer of -- in 2007 and introduced to  
14 Criterion in August of 2007 and proposed to the  
15 refineries during the six-month period starting  
16 October 2007 was foil laminated which made it look  
17 stronger when compared to just the polypropylene. It  
18 looked like it was metal because it's competing against  
19 flow bins which weigh 950 pounds and are made out of  
20 steel. So the foil laminate gave it the appearance of  
21 greater strength. That was expected to be a selling  
22 point.

23 So when the Criterion truck shows up at the  
24 refineries delivering fresh catalyst, a selling point  
25 when Packgen calls on that refinery would be the fact

1       that they'd seen fresh catalyst arrive in a Packgen  
2       container.

3       Q.       Was that the only factor you relied on?

4       A.       No, that was one factor. The other factors are  
5       the 25 to 50 percent cost savings. I mean you just  
6       can't ignore the economics. I mean I think the  
7       economics of -- those kind of savings is enormous and I  
8       don't want to say it overrides everything else, but  
9       it's really important. It's not a ten percent savings,  
10      it's not a five percent savings, it's not, you know, a  
11      Plymouth versus a Chevy versus -- they don't make  
12      Plymouth anymore -- but Ford versus Chevy. It's an  
13      enormous cost savings for those 37 refineries.

14             The other over a hundred refineries, you know,  
15      yeah, maybe, maybe not, could be, I don't know, you  
16      know, but those 37 that were targeted were going to  
17      enjoy substantial savings.

18      Q.       And did you rely on any statements by Mr. Berman,  
19      the catalyst industry expert, as to Packgen's presence  
20      in the market?

21      A.       Yes. He said that Packgen had exceptional market  
22      presence and expertise, which really goes to preventing  
23      competition from entering the market and, you know,  
24      Packgen's been in this -- as Packgen has been in the  
25      container business since it opened in 2002, but the --

1     you know, the original company's more than 30 years  
2     old. They have a great deal of experience in the  
3     container industry.

4             MR. OLAFSEN: No further questions. Thank  
5     you.

6             THE COURT: Cross-examination.

7             MR. DUNITZ: Briefly. May I have a moment?

8             THE COURT: Sure.

9                     CROSS EXAMINATION

10     BY MR. DUNITZ:

11     Q.     Good afternoon, Mr. Filler.

12     A.     Good afternoon, Mr. Dunitz.

13     Q.     What percentage of the refinery industry does  
14     CRI/Criterion sell fresh catalyst to?

15     A.     I don't know.

16     Q.     What percentage of the 37 refineries on the list  
17     purchased their fresh catalyst from Criterion?

18     A.     I don't know.

19     Q.     So you don't actually know whether the Cougars  
20     would even show up at these 37; do you?

21     A.     I was told that they would show up. I wasn't  
22     told which ones.

23     Q.     Well, do you know if any of them purchased --

24     A.     I can't identify which ones purchased it.

25     Q.     Do you know whether any of them purchased it from

1 CRI/Criterion?

2 A. I was told that some of them purchased it. I was  
3 not given any numbers.

4 Q. Also, you testified that the simulation models  
5 are no longer -- for CRI are no longer your opinions?

6 A. Correct.

7 Q. And why is that?

8 A. Because those models -- the latest CRI  
9 simulation model had an expected -- had simulated the  
10 selling prices and since there was no evidence to  
11 support those increases, I dropped it.

12 Q. You also did one, and I'm sure Mr. Olafsen will  
13 say at my request, but you also did a simulation of the  
14 196 price; isn't that correct?

15 A. Well, I think in that one, the three inputs were  
16 196.86 so it wasn't really a simulation.

17 MR. DUNITZ: Nothing further, Your Honor.

18 THE COURT: Mr. Olafsen?

19 MR. OLAFSEN: Nothing further, Your Honor.

20 THE COURT: Thank you, you may stand down,  
21 sir. How do we want to proceed?

22 MR. BIXBY: I know you have something else at  
23 2:30, so we can probably be very brief. We can talk  
24 scheduling, briefing and anything else Your Honor would  
25 like to talk about.



1 THE COURT: Sure. Let's assume it's going to  
2 take 30 days to get a full transcript --

3 MR. BIXBY: That's fine.

4 THE COURT: And assuming that the transcript's  
5 available sometime at the end of the first week of  
6 April, when -- when would you like to file your  
7 memorandum?

8 MR. BIXBY: I think the first week of April, I  
9 think if we had six weeks, until mid-May, to file the  
10 brief, and I would enter a request that the briefs be  
11 longer than ten pages. I would suggest maybe 20 or 25?

12 THE COURT: I have no problem with the length,  
13 but the length of time seems to be -- that would bring  
14 us to --

15 MR. BIXBY: I was suggesting mid-May.

16 MR. DUNITZ: Your Honor, I'll be traveling a  
17 lot in April. I'll be gone for half of the first week  
18 and the entire last week of April.

19 THE COURT: You work at a pretty big firm;  
20 don't you?

21 MR. BIXBY: No one knows the stuff like he  
22 does, Your Honor, that's why his schedule is relevant  
23 to me.

24 THE COURT: My concern is this is a precursor  
25 to another motion.

1 MR. DUNITZ: I understand.

2 THE COURT: And it's gone on for a little  
3 while. You really need six weeks to file 25 pages?

4 MR. BIXBY: Perhaps by the end of the first  
5 week of May? That would give us an extra week. Would  
6 that be helpful and be more reasonable instead of the  
7 mid to third week of May?

8 THE COURT: So you're thinking of May 2, which  
9 would be Friday the --

10 MR. BIXBY: That would be less than four  
11 weeks, I think.

12 MR. DUNITZ: I will be gone from the 23rd to  
13 the 29th.

14 THE COURT: So you want May 9th?

15 MR. BIXBY: If the transcripts are issued the  
16 first week of April, I think that would be between 28  
17 and 35 days.

18 THE COURT: Well, it would be five weeks. Why  
19 don't we do it this way. I'm just getting a signal  
20 that it might not be 30 days, but it may be less than  
21 that. Maybe two weeks from today, do you think?

22 MR. BIXBY: Then we may be able to do May 2  
23 instead of May 9th. Hold on one second.

24 MR. DUNITZ: If it is two weeks, then I think  
25 April 22nd I could submit one before I leave.

1           THE COURT: Well, if he manages to get the  
2 transcript to you on the 17th, you're talking about  
3 having five weeks still to get a 25 page brief? Why  
4 can't we do it by the 14th, which is 30 days?

5           MR. DUNITZ: That would work, Your Honor.

6           THE COURT: Okay. So unless there's some sort  
7 of complication, defendant's brief would be due by  
8 April 14. How long do you need to respond, Mr.  
9 Olafsen?

10          MR. OLAFSEN: I practice alone, but my biggest  
11 problem then is I'm away overseas from April 17 to  
12 April 28th, which means -- you said the 14th, which  
13 means I won't have a chance to much more than look at  
14 their's before I go, so if I could have 3 or 4 weeks  
15 after I get back from overseas, I think that would be  
16 enough, which would be May 19th.

17          THE COURT: All right. What am I going to do  
18 about that, Mr. Dunitz, I mean it's his claim. My  
19 concern is always that the plaintiff is moving on  
20 something -- the plaintiff is without the money that  
21 he's hoping to get at the end of it.

22          MR. DUNITZ: I mean if he needs until then,  
23 that's fine. I wonder if I can have until the 21st.

24          MR. OLAFSEN: Since I'm going to be overseas  
25 and returning on the 28th, I will say that I won't be

1       doing anything on it until the 28th.

2               THE COURT:   Okay.   So you get until the 21st  
3       and reply by the 19th of May.   He's going to file --  
4       you're going to file your memo by April 21st and he's  
5       going to file his response by May 19th.

6               MR. OLAFSEN:   That would give me three weeks  
7       when I return, I think three weeks.

8               MR. BIXBY:   And then maybe a reply after that?

9               THE COURT:   I think you will pretty well  
10       squeeze the sponge by that time.

11              MR. BIXBY:   You never know what you're going  
12       to see in a brief.   I think even a limited right to  
13       reply would be helpful.

14              THE COURT:   All right.   In that case, get it  
15       in within a week, the 26th.   Anything else?

16              MR. DUNITZ:   How many pages?

17              THE COURT:   I'm not going to -- oh, the 26th  
18       is Memorial Day.   How about the 27th?   I don't impose  
19       page limits on something like that.   You take -- just  
20       keep in mind two things.   One, although I do not impose  
21       limits of that sort, the longer you go, the less  
22       effective it is.

23              MR. DUNITZ:   Yes, Your Honor.

24              THE COURT:   And the longer you go, the more in  
25       the way of -- with your situation, the more issues you

1 raise, the more likely it is it's going to be an issue  
2 that will allow me to credit the testimony; in other  
3 words, every single issue you're going to have to win  
4 on; right?

5 MR. DUNITZ: Right.

6 THE COURT: Because if there's one issue in  
7 which I disagree with you and that he's an appropriate  
8 expert, then he's an expert; right?

9 MR. DUNITZ: Correct.

10 THE COURT: Sort of like the summary judgment  
11 so as I've analogized it at the Rule 56(h) conferences,  
12 it's like putting out statements of material fact. The  
13 more statements of material fact you put up, the more  
14 golf balls you've teed up and all he has to do is hit  
15 one.

16 So there may be some reason to limit or maybe not,  
17 and I understand that as well, but the more you go  
18 on -- I mean I've heard it, I've heard the point, I've  
19 heard the counterpoint, I've heard the response.

20 MR. DUNITZ: Thank you, Your Honor.

21 THE COURT: Okay? Mr. Olafsen, same message  
22 to you.

23 MR. OLAFSEN: Yes, Your Honor.

24 THE COURT: But I would like to thank counsel.  
25 This is interesting and you've obviously had some very,

1 very bright people.

2 MR. DUNITZ: Thank you, Your Honor.

3 THE COURT: Anything else?

4 MR. OLAFSEN: No, Your Honor.

5 MR. DUNITZ: No, Your Honor.

6 THE COURT: Court will stand in recess.

7 (End of proceeding)

8 C E R T I F I C A T I O N

9 I, Dennis Ford, Official Court Reporter for the United  
10 States District Court, District of Maine, certify the  
11 foregoing is a correct transcript from the record of  
12 proceedings in the above-entitled matter.

13 Dated: March 7, 2014

14 /s/ Dennis R. Ford

15 Official Court Reporter  
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